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Incidents in the Early Times of the Province

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UPPER CANADA SKETCHES

INCIDENTS IN THE EARLY TIMES OF THE PROVINCE

"Breathes there the man with soul so dead,
Who never to himself hath said,
This is my own, my native land!"

Ducit Amor Patriae.

WILLIAM RENWICK RIDDELL,
LL.D., F.R.H. SOC., ETC.

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DEDICATION

To the Memory

of

CHARLES CANNIFF JAMES,

C.M.G., M.A., LL.D., F.R.S. CAN., ETC.,

Through whose influence and example
I was led to the study of the story of

OLD UPPER CANADA,

These sketches are dedicated.

He died at St. Catharines, Ontario, June 23, 1916,
then as ever wholly devoted to his Country.

Dulce et decorum est pro patriâ mori.

Pro patria sit dulce mori, atque decorum: Vivere pro patria dulcius esse puto.

159659

ERRATA

P. 11, l. 4, for (1804) 44 Geo. III, read (1803) 43 Geo. III.
21, last line, for (1915) 55 Geo. III, read (1815) 55 Geo. III.
41, l. 23, for 2 Geo. IV, read 11 Geo. IV.
49, last line, for 1y read by.
79, l. 3 from bottom, for Gore (Niagara) read Niagara.
90, l. 30, for 45 W. & M. read 4, 5 W. & M.
91, l. 24, for (1745) read (1795).
106, l. 27, for c. 85, read c. 83.

PREFACE

The Sketches in this little volume were (with some others) published in the Canadian Law Times for 1920 and 1921. They were written in the hope of attracting the attention of the readers of that Journal and the legal profession generally to the romantic and interesting early history of our Province—to my mind as romantic and interesting as the early history of any land, and having the enormous advantage over most in that it is veridical and evidenced by existing contemporary documents.

The treasures of the official Archives at Ottawa and Toronto are all too little known. It is, however, a pleasure to observe that they are being more and more resorted to.

I have, whenever possible, given definite references to the authority for my statements. I am strongly of the opinion that a historian or biographer owes to his readers the duty not only of perfect accuracy, but also of furnishing such evidence of accuracy as may be available.

It is too much to hope that there are no mistakes in these Sketches; I can, however, give an assurance that every effort has been made to avoid error.

A very large proportion of the matter is of legal interest, but I venture to think and to hope that others than lawyers will find pleasure in perusing it.

William Renwick Riddell.

Osgoode Hall,
Toronto, April, 1922.

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The following contractions are employed: U.C., Upper Canada; L.C., Lower Canada; Can., Canada; Dom., Dominion of Canada; Imp., Imperial; Memb., Member; Sp. Speaker; J., Judge or Justice; C.J., Chief Justice; Leg. Col., Legislative Council or Councillor; Ex. Col., Executive Council or Councillor; Leg. Assy., Legislative Assembly; K.B., King's Bench; C.P., Common Pleas; Chy., Chancery; Ct., Court; Inf. ex off., under Information ex officio; L.S., Law Society of Upper Canada; Col., Counsel; A.-G., Attorney-General for Upper Canada; S.-G., Solicitor-General for Upper Canada; Lt.-Gov., Lieutenant-Governor; V.C., Vice-Chancellor; Ont., Ontario; Que., Quebec.

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EXTRA-TERRITORIAL CRIMINAL JURISDICTION IN BRITISH CANADA

By William Renwick Riddell, LL.D., F.R.S.Can., &c., Justice of the Supreme Court of Ontario.

When the Treaty of Paris, 1783, the Definitive Treaty between Great Britain and the revolting American Colonies, divided the territory on the Continent of North America theretofore British between the Mother Country and the new Republic, there was doubt as to the boundary at some points but it was clear at others. It was perfectly clear that the parallel of 45 degrees north latitude was the boundary from the Connecticut River west to the River St. Lawrence, and that west from that point the middle line of the Great Lakes and connecting rivers was to be taken.

Britain was in possession of territory south of the 45th parallel where that was to be the boundary, and of territory to the right of the Great Lakes and connecting rivers. She had posts at Point au Fer and at Dutchman's Point on Lake Champlain, and the territory between these and the 45 degrees parallel had a population practically all of whom were Loyalists and desired to remain under the old flag. Further west, she had Oswegatchie, Oswego, Niagara (on the east of the river), Detroit, Michillimackinac, most of the inhabitants of which were also Loyalists. The United States failed to carry out certain provisions of the Treaty, and Britain kept possession of the Posts—which the cause and which the effect or whether the relation of cause and effect existed at all between the two facts is not of consequence here.

The Province of Quebec had by the Quebec Act (1774), 14 George III. c. 83, been given the territory immediately north of the 45th parallel west to the St. Lawrence, thence up the eastern bank of that river to Lake Ontario, through Lake Ontario and the Niagara River, along the right bank of Lake Erie to the western

boundary of Pennsylvania, south along this boundary to the Ohio, along the bank of the Ohio to the Mississippi and "northward" to the boundary of the Hudson's Bay Territory. Quebec therefore never had the territory between the 45th parallel and Point au Fer and Dutchman's Farm; nor did she ever have Oswegatchie, Oswego or Niagara; while she *de jure* lost Detroit and Michilimackinac.

It was not long before a question arose concerning the government of this anomalously situated territory: and it became acute when a soldier of the 29th Regiment of Foot murdered another of the 53rd and a civilian was murdered by two others near Niagara and east of the River.

Magistrates on the opposite side of the River Niagara took cognizance of these two murders, examined witnesses and sent the accused to Montreal for trial early in 1788. At that time the enormous territory, now the Provinces of Ontario and Quebec (and *de facto* much more), was divided into two Districts, that of Quebec coming as far west as the Rivers Godfroy and St. Maurice, and that of Montreal including all the remainder. (Quebec Ordinance, September 17, 1764).

When the Chief Justice of the Province, William Smith, found these men in the gaol at Montreal, he issued a writ of *habeas corpus*, and under that writ had the men brought to Quebec—the seat of government.

Lord Dorchester, the Governor, May 5, 1788, wrote an official letter to Brigadier General Henry Hope, the Lieutenant-Governor, informing him of the facts which had been brought to his attention by the Chief Justice, and asking for the opinion of the Council—

"If they are to be tried as for foreign murders under the Statute of 33 Henry VIII. c. 23, the Commission must be preceded by the examination it directs, and for that purpose I must request you will convene a competent number of the Council for the full and distinct reports which the importance of the subject and their respective cases may require. As they may be followed by a Special Commission of Oyer and Terminer, the Chief Justice's attendance on the preparatory examination may be dispensed with and the Committee can command the aid of Mr. Attorney and Mr. Solicitor-

General on all such questions which the law and the ends of public justice may demand."

The Lieutenant-Governor called together a special Committee of the Privy Council at Quebec on Tuesday, May 20, 1788, and there attended the Lieutenant-Governor himself, two Judges of the Court of Common Pleas at Quebec, (Messrs. Mabane and Dunn), the Postmaster-General Finlay and Messrs. Grant, Baby and De St. Ours.

The Lieutenant-Governor read Dorchester's letter and the Statute referred to: and it was resolved that it should "first be considered whether the statute . . . authorizes the Committee to proceed to the examination requested," and that "it should be submitted to the Attorney-General and the Solicitor-General to give their opinions in writing whether the statute is in force in the Province, and also to call upon them to attend the Committee on Tuesday morning at 11 o'clock to be heard with their reasons, and to give such other information on the subject as the Committee may require" (Can. Arch. Q. 37, p. 224).

The Attorney-General, James Monk, and the Solicitor-General, Jenkin Williams, delivered their opinions in writing to Hope. They said they had considered the question submitted to them; the opinion was:—

"This question arises upon the two cases now presented to the Governor, to wit: Alexr. Henry Thompson, a soldier of his Majesty's 29th Regiment, for the murder of Isaac Allen, late a soldier of His Majesty's 53rd Regiment at Niagara, on the south side of the river on land not within the bounds described by the Quebec Act, 14 Geo. III. c. 83, tho' a territory within His Majesty's Government and Protection and James Gale, for the murder of Nehemiah Street near Niagara aforesaid; opinion that Statute in force and that His Excellency the Governor, Keeper of the Great Seal of the Province may legally Issue a Commission of Oyer and Terminer for the Trial of the above Felonies should His Majesty's Council upon Examination into the charges report to His Excellency that there is sufficient Ground to suspect that the said felonies have been committed.

The Crime of Murder being a Felony at Common Law, the Statute has given power to try that felony out of the County or Shire where committed, and even when committed without the King's Dominions. try the same within such place as may be directed by a Commission of Oyer and Terminer to be issued for

that purpose. The Quebec Act in our opinion by introducing into the Province the Criminal Laws of England and directing the same methods of Prosecution and Trial, punishment and forfeitures as are used and directed by the Laws of England has made the Statute of 33 Harry the 8th, c. 23, part of the Laws of this Province."

The statute 33 Henry VIII. c. 23, was passed in 1541—the Preamble recites inconvenience and expense arising from the practice of sending to "divers Shires and Places of the Realm and other the King's Dominions" for "Persons upon great Grounds of vehement Suspicion as well of High Treason, Petty Treason and Misprisions of Treason as of Murders," to be examined before the King's Council upon their offences—and notwithstanding such examination "Such Offenders . . . by the Course of the Common Law of the Realm must be indicted within the Shires or Places wherein they committed their offences," and there tried by the Inhabitants or Freeholders. It therefore enacted:

"That if any Person or Persons being examined before the King's Council or three of them upon any manner of Treasons, Misprisions of Treasons or Murder, do confess such Offences, or that the said Council or three of them upon such Examination shall think any Person so examined to be vehemently suspected of any Treason, Misprisions of Treasons or Murder . . . then . . . His Majesty's Commission of Oyer and Terminer . . . shall be made . . to such Persons and into such Shires or Places as shall be named by the King's Highness for the speedy Trial, Conviction or Delivery of such Offenders . . ."

This Statute was effective over all "the King's Dominions"; and while the Statute of 1554, 1 & 2 Philip and Mary, reinstated the Common Law as to the place of trial when the offence was committed in England, it did not repeal 33 Henry VIII. c. 23, where the offence was committed out of England. (See Dyer's Reports, 132, 284; 11 Coke's Reports, 63; 3 Coke's Institutes, 27; 1 Anderson's Reports, 104). The Statute of 33 Henry VIII. c. 23, was in full force at the time in question (See Blackstone's Commentaries, Book IV. p. 301), and was not repealed until 1828, 9 George IV. c. 31, s. 1, as to England: 9 George IV. c. 74, s. 125, as to India.

The Colonial Crown lawyers were of opinion that being in force in England it was also in force in Quebec.

On Tuesday, May 22, the same members met: Hope read the opinion of the Law Officers of the Crown. Debates arose and the question was put:—

"It is the opinion of the Committee that they shall proceed to the Examination requested in His Excellency the Governor's letter of reference to them?"

For the Affirmative:	*For the Negative:*
Mr. Baby.	Mr. De St. Ours.
Mr. Grant.	The Lieut.-Gov. —2
Judge Mabane.	
Judge Dunn.	
Mr. Finlay —5	

The first paragraph of Dorchester's letter was ordered to be communicated to the Attorney-General:

"in order that he may take the necessary steps for bringing such Prisoners on Saturday Morning next at 10 o'clock before the Committee of Privy Council for Examination."

The next meeting was on Friday, May 23, when the same members were present. Hope read a draft by the Attorney-General of a Warrant, and also a brief statement prepared by the Attorney-General of the cases to be considered. The warrant was in the name of Henry Hope as Lieutenant-Governor. The Attorney-General was then sent for and gave verbal explanations on the mode of procedure. The draft warrant was adopted and warrants were directed to be issued for James Gale and Abraham Hammell—the Attorney-General to be notified to attend the examination on the morrow at 10 o'clock.

On Saturday, May 24, the same members were present. Monk, Attorney-General, attended and produced James Hoghtellin, who was sworn and examined. Then Abraham Hammell was brought in before the Committee, and informed by the Attorney-General that he stood charged of the murder of Nehemiah Street, and had been brought up under the Statute 33 Henry VIII. c. 23,

"On certain depositions taken before the Magistrates of Niagara from whence he had been sent Prisoner under their warrant to the Gaol at Montreal and . . . removed . . . by writ of *habeas corpus* under the Order and Sign Manual of the Chief Justice. . . ."

Hammell's deposition was read, also two depositions by James Hoghtellin, and a brief statement of the evidence.

"The Committee then repeated distinctly to the Prisoner, Abraham Hammell, the charge on which he stood accused before them, and asked the Prisoner what he has to say in answer thereto —on which he voluntarily made and subscribed the Declaration."

He was then remanded to the custody of the Sheriff and a warrant was issued for James Gale, accused of the like crime. When he appeared the same procedure was gone through with the same result.

On Monday, May 26, Mr. Finlay was employed elsewhere on "pressing and indispensable public business" and the committee adjourned.

On Wednesday, May 28, Alexr. Henry Thompson was brought in, and after the same procedure he was remanded. In his case there had been a coroner's inquest, as well as proceedings before a Magistrate at Niagara. The depositions were read as also the affidavit made by the prisoner in the Court at Montreal in September last, and two affidavits of Edward Meredith and Fras. Child taken before a Magistrate at Montreal in March last.

Instructions were given for warrants for François Nadeau and Eustache Le Compte.

François Nadeau brought it (all proceedings were interpreted to him in French).

He was charged with

"Murder of John Ross at the River Arabaska in the distant North-Western Country, which place the Attorney-General said he was doubtful of being within the ordinary Jurisdiction of the Courts of Justice of the Province, and for which felony therefore he had brought the Prisoner before the Committee of Privy Council to be examined as a foreign murder under the Statute of 33 Henry VIII. c. 23."

Examinations had been taken before James McGill, J.P. of Montreal, and the prisoner had been committed

to gaol at Montreal, and brought up under a *habeas corpus* issued by the Chief Justice. The same procedure was followed: Nadeau subscribed the voluntary declaration and was remanded.

Eustache Le Compte, also a Canadian, was then brought in; the same procedure and the same result followed.

Judge Mabane gave in a paper in which he said:

"Mr. Mabane tho' in compliance with the letter of His Excellency Lord Dorchester, he gave his vote for proceeding to the Examination of the Prisoners and witnesses which the King's Attorney-General should bring before the Committee, begs leave to be understoood not to have given an opinion that the Statute of the 33 Henry VIII. c. 23, is in force within the Province in such a manner as to authorize the Governor of it to issue a Commission of Oyer and Terminer for the trial of persons for murder committed without the limits assigned to the Province by His Commission, but only to sending them to England to be tried in such County as it shall please the King to direct"

Then the Committee proceeded to consider whether the prisoners were "vehemently suspected" of felony —all the Council except de St. Ours decided against Hammell and Gale, and all but Grant against Nadeau and Le Compte—the Lieutenant-Governor giving no opinion and not voting (Can. Arch. Q. 36, 1, p. 280). Dorchester communicated the facts to Sydney, the Secretary of State for the Home Department, June 9—the Colonies were from 1768 till 1782 in charge of a Secretary of States for the Colonies; from the abolition of that office in 1782 by the Statute 22 George III. c. 82, till July 11, 1794, the Colonies were in charge of the Home Secretary (Haydn's Book of Dignities, pp. 228, 226 is in error as to Sydney's Department—see D. N. B. sub. voc. Townshend, Thomas, Vol. LVII. p. 131). In his despatch Dorchester said that he would issue a Special Commission of Oyer and Terminer to try those against whom the Council had found, without regard to the scruples of certain members of the Council, but that in case of a conviction he would grant a reprieve till His Majesty's pleasure should be known (Can. Arch. B. 36, 1, 276).

A Special Commission was accordingly issued. The first to be tried was Alexander Henry Thompson for the murder of Isaac Allen near the Post at Niagara—he was convicted before the Chief Justice and sentenced to death. The Chief Justice was not satisfied with the verdict on the evidence adduced and the jury interceded for a pardon as they were informed and believed that the prisoner had been insane for several years back. Dorchester, October 14, communicated the facts to Sydney and respited the prisoner until instructions should be sent of His Majesty's pleasure. Dorchester recommended a pardon on condition that the convict should depart from the British Dominions (Can. Arch. B. 38, p. 162).

October 17, the Governor reported the conviction on that day of James Gale for the murder of Nehemiah Street on September 1, 1787, near the Post at Niagara, and his sentence to death—also that he had respited the execution. He also stated that the chief witness was Abraham Hammell, an accomplice for whom he recommended a pardon on condition of his leaving the British Dominions. The Chief Justice was firmly convinced of the guilt of Gale and the Governor made no recommendation for mercy for him (Can. Arch. Q. 38, p. 182).

Sydney submitted the matters to the Imperial Law Officers of the Crown, Sir Archibald Macdonald, Attorney-General (afterwards, 1793-1813, Chief Baron of the Exchequer), and Sir John Scott (afterwards Lord Eldon, Lord Chancellor 1801-1806, 1807-1827). These very great lawyers gave their opinion, Lincoln's Inn, October 6, 1788, that if the offences were in fact committed without the Province, those charged could not be tried within the Province, and that there was no authority in the Governor to issue such a Commission of Oyer and Terminer; that Parliament, *i.e.*, the Imperial Parliament, must provide a remedy if one must be provided, and that it was not advisable to send such offenders to England (where the jurisdiction undoubtedly did exist) on the ground of delay, inconvenience

and expense (Can. Arch. Q. 38, p. 138). Sydney sent this opinion to Dorchester, Whitehall, November 6, 1788 (Can. Arch. Q. 38, p. 137), to guide him in his future course, but said he had not yet consulted his colleagues as to those already convicted.

There was no need for Dorchester to await further instructions and the prisoners were released.

I can find no other record of any attempt on the part of any Canadian Court to try for a criminal offence committed outside the old Province of Quebec until after the Imperial Act of 1803, 43 George III. c. 138.

But the inhabitants of the territory once undoubtedly within Quebec and while *de jure* belonging to the United States, *de facto* held by Britain, had no such immunity. Detroit, Michillimackinac, etc., and their appurtenances continued under the English law and British rule. There is only one record extant of a criminal court of Canada dealing with crime in what is now Michigan, but there can be no kind of doubt of the jurisdiction being constantly exercised by the Courts of Quarter Sessions and the Courts of Oyer and Terminer for the District of Hesse. The District of Hesse was the most western of the four Districts into which Lord Dorchester in 1788 divided the territory afterwards Upper Canada: it stretched from the longitude of the extreme end of Long Point, Lake Erie, to the western limit of the Province. In 1792, the name was changed to the Western District.

The record mentioned will be found in the Fourteenth Report of the Bureau of Archives for Ontario (for 1917), pp. 179 *et seq.* The Court of Oyer and Terminer—what is generally called the "Criminal Assizes," September 3, 1792, "His Majesty's Court of Oyer and Terminer, and General Gaol Delivery" opened at L'Assomption (now Sandwich, Ontario), with William Dummer Powell (afterwards Chief Justice of Upper Canada) presiding. Grand Jurymen were called from both sides of the river—the Judge himself resided in Detroit—an inquisition was filed on

the death at Michillimackinac of an Indian man Wawanisse, another respecting Pierre Lalonde killed at Saguina (Saginaw) by Louis Roy, another of the murder at Detroit of Pierre Grocher by an Indian man called Guillet—there had been also a murder of David Lynd, alias Jacko, on the River La Tranche (the present Thames) by two Indians. True bills were found by the Grand Jury against Louis Roy, Guillet and Josiah Cutan of Detroit (for burglary). Roy was acquitted of murder, excusable homicide by misfortune being found—he was remanded to sue out his pardon as the custom was in those days and for long after. Cutan, a coloured man, was found guilty of burglary at Ste. Anné's and sentenced to death. Guillet was not arrested nor were the two Indians who slew Jacko.

A Commission dated January 20, 1791 (still in existence; a copy is in my possession, the original in the Canadian Archives) to Powell and others to hold a Court of Oyer and Terminer and General Gaol Delivery for the District of Hesse, directs them to sit in Detroit; and the seat of the Court of Quarter Sessions for the Western District (formerly the District of Hesse) was fixed at Detroit by the Upper Canada Statute of 1793, 33 George III. c. 6; the same statute provided for a Court of General Sessions of the Peace in the town of Michillimackinac in July of each year.

A suggestion apparently wholly unauthorized by Simcoe, made to the Secretary of State, that the people of Detroit should be differentiated from those of the rest of the British territory, was met by the Secretary's firm statement to Simcoe, the Lieutenant-Governor of Upper Canada:

"the settlers at Detroit and the other parts are subject to the laws of the Province . . . so long as the Posts are in our possession; all persons resident within the same must be considered to all intents and purposes as British subjects." (Can. Arch. Q. 278 A, p. 24; do. do. Q. 279, 1, 251. letter dated October 2, 1793). See also Can. Arch. Q. 280, 1, p. 106.

Until the delivery up to the United States in 1796 of these Posts, the Canadian Courts exercised jurisdiction civil and criminal over the occupied territory.

The prevalence of crimes of violence in the Far West, and the absence of convenient means for their punishment, induced the Imperial Parliament in 1804 to pass the well-known Statute 44 George III. c. 138, for the trial of offences committed in the "Indian Territories or parts of America not within the limits . . . Lower or Upper Canada or . . . the United States" in the Courts of Lower Canada or if the Governor should think that justice might be more conveniently administered in Upper Canada, then in the Courts of Upper Canada.

Under this legislation a number of persons were tried in the Courts of Lower and Upper Canada for offences ranging from murder to theft committed in the Indian Country—these trials are reported in several readily accessible publications, and as none of them really bears upon extra-territoriality I pass them over here.

The extra-territorial power of the Dominion of Canada has been discussed in several cases.

The Criminal Code of 1892 rendered liable to conviction for bigamy any person who being married goes through a form of marriage with another person "in any part of the world"—but if the form of marriage is elsewhere than in Canada, the person so offending is not to be convicted of bigamy unless he, a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

The Courts divided in opinion as to the validity of legislation making it in Canada a crime to go through a bigamous form of marriage outside of Canada; in the case of the *Queen* v. *Brierly* (1887), 14 Ontario Reports, 525, the Chancery Divisional Court composed of Sir John Boyd, Chancellor, Mr. Justice Ferguson and Mr. Justice Robertson, held the legislation valid; but seven years later, in 1894, the Queen's Bench Divisional Court, composed of Chief Justice Armour and Mr. (afterwards Chief) Justice Falconbridge, held the contrary in *Queen* v. *Plowman,* 25 Ontario Reports,

656. The matter was referred to the Supreme Court of Canada, and that Court in 1897 decided in favour of the validity of the statute, In re Criminal Code, sections 275, 276—Chief Justice Sir Henry Strong dissented, but the other Judges, Gwynne, Sedgewick, King and Girouard, JJ., agreed in the judgment—but on the ground that the accused to be convicted must be found to have left Canada with intent to commit the offence.

The Judicial Committee of the Privy Council in 1891, in the case of *Macleod* v. *Atty.-General,* N.S.W. (1891) A. C. 455, decided that a Colony cannot convict a person of bigamy who married in another jurisdiction, *e.g.,* the United States; so that while the question of the Lord High Steward in Earl Russell's Case (1901) A. C. 466 at p. 448: "Has not the Imperial Legislature a right to legislate with respect to His Majesty's subjects all over the world wherever they are?" must be answered in the alternative, the powers of a Colonial Legislature are not so extensive.

William Renwick Riddell.

Osgoode Hall, Toronto, Dec. 26, 1919.

WHEN THE COURT OF KING'S BENCH BROKE THE LAW

By William Renwick Riddell, LL.D., F.R.S. Can.,
Justice of Supreme Court of Ontario.

The War declared by the United States against Britain in 1812, when she was straining every nerve to prevent an ambitious European Emperor from obtaining the mastership of the world, had many results—some, inevitable, for they appear in all great wars, blood and treasure poured out like water, want and rise of the price of necessaries,[1] a legacy of hate and distrust. It should have been foreseen that the resentment of the United Empire Loyalists in Canada against

[1] The great increase in the price of everything complained of at the present time is precisely what was experienced after the Pelopennesian Wars, the Carthaginian Wars, the Thirty Years' War, the Napoleonic wars and all other great wars. The result of the war of 1812 in that regard in Upper Canada appears in many contemporary documents.

For example, when the Justices of the Court of King's Bench presented their Memorial, January 10th, 1814, to the Governor, and pointed out that there was a discount of 20 per cent. on the army bills, the memorial is interesting at the present time, as it shows that during and by reason of the war, the necessaries of life doubled in price. They give the following table:—

	Before the War.	Now.
Bread	1 shilling (20 cts.)	2 shillings
Beef	6 pence (10 cts.)	1 shilling
Wood	7s. 6d. ($1.50)	15 shillings

They also point out that of every £100 of their nominal salary, they receive in cash only £52.13.0, thus:—

Nominal salary, payable in England	£100. 0.0
Income tax, 10%	10. 0.0
	£ 90. 0.0
Commission on £90 at 2½%	2. 5.0
	£ 87.15.0
Discount on exchange, 25%	21.18.9
	£ 65.16.3
Depreciation on army bills, 20%	13. 3.3
Net receipts	£ 52.13 0

Can. Arch., Sundries, U. C., 1814, January-June.

The Judiciary of this Province have never been led into display or extravagance by large salaries—and that is one precedent held in reverence never to be departed from.

their separated brethren in the United States, which had almost died out, would be revived and would flourish in greater vigour than ever.

There were however certain results which could not be anticipated, some of importance, some rather curious than important. It is of one of the latter, the most interesting from the lawyers' point of view, that this paper treats.

His Majesty's Court of King's Bench for the Province of Upper Canada[2] deliberately broke the law in the presence of the Treasurer of the Law Society of Upper Canada, its presiding officer — the Court admitted four young men to the Bar in 1812 and two in 1813.

The history of the legal profession (so far as it affects our subject) in this Province is not long. For some time after the Conquest, 1759-1760, of Canada, the Governor at Quebec followed the earliest English system—which had been the system in French Canada before the Conquest — and granted licences to practise law to such persons as he chose; this system came to an end in 1785, when an Ordinance[3] was passed separating the profession of "Barrister, Advocate, Solicitor, Attorney, or Proctor at Law" on the one hand from that of "Notary" on the other.[4]

This Ordinance required five years' service as a clerk with some advocate or attorney in the British dominions, or six years' with a Register or Clerk of a Court of Common Pleas or Court of Appeals. Then the postulant must be examined by "some of the first and most able Barristers, Advocates and Attornies . . . in the presence of the Chief Justice (of the

[2] This was the name given to the Court by the Judicature Act (1794), 34 Geo. III., c. 2, s. 1 (U.C.).

[3] The Ordinance (1785), 25 Geo. III., c. 4, of April 30th, 1785, can be seen in the Osgoode Hall Library.

These Ordinances are published in thin quarto volumes, are very rare, and met with as a rule only in law libraries; the Canadian Archives Department has published them in convenient form as Sessional Papers, 1914, No. 29*b*, and 1916, No. 29*a*; the Ordinance referred to in the text will be found in Session Papers, 1916, No. 29*a*, pp. 169 *sqq*.

[4] A division still rigidly enforced in our sister Province of Quebec, but not in this province for more than a century and a quarter, *i.e.*, not since 1794.

Province), or two or more Judges of . . . a Court of Common Pleas," and approved by the Chief Justice or the Judges, and receive a certificate that he is "of fit capacity and character to be admitted to practise the law."[5]

In 1794, the Legislature of Upper Canada suspended the operation of this Ordinance for two years, and authorized the Lieutenant-Governor to grant a licence to not more than sixteen persons "to act as Advocates and Attornies in the conduct of all legal proceedings in this Province."[6]

In 1797 an Act was passed, commonly known as the Law Society's Act,[7] authorizing the existing practitioners of law to form themselves into a "society to be called the Law Society of Upper Canada." This statute, by section 5, provided "That no person other than the present practitioners and those hereafter mentioned, shall be permitted to practise at the Bar . . . in this Province unless such person shall have been . . admitted into the said Society as a student of the laws, and shall have been standing in the books of the said Society for and during the space of five years, . . . and shall have been duly called and admitted to the practice of the law as a Barrister according to the constitution and establishment thereof." "Those hereafter mentioned" were those admitted to practise at the Bar in England, Ireland, Scotland or any British North American Province—they might be admitted to practise by the Judges of the King's Bench, but must within a month of their admission, enter themselves of the Law Society. To become an Attorney or Solicitor[8] it required only

[5] The Ontario practitioner will recognize the similarity in the "Certificate of Fitness" given by the Law Society at the present time to an intending solicitor.

[6] By the Act (1794), 34 Geo. III., c. 4 (U.C.).

[7] (1797), 37 Geo. III., c. 13 (U.C.).

[8] The attorney practised in the Common Law Courts, the solicitor in Equity. We had, however, no Court of Equity until 1837. The Attorney-General, John White, made an effort by a proposed Rule to prevent the same person being both barrister and attorney, as is the law in England, but his death prevented the Rule carrying. A second attempt was checked by the Judges as visitors of the Law Society, and a third by the Legislature.

three years' standing instead of five on the books of the Law Society. This Act, by section 8, also repealed the Ordinance of 1785. Save in the exceptional cases, it will be seen that the Court of King's Bench had no jurisdiction to admit to practise as a Barrister. When the ten pioneer lawyers met at Wilson's Hotel, Newark (Niagara-on-the-Lake), July 17, 1797, and formed themselves into the Law Society of Upper Canada, the profession of Barrister at Law became a sacred preserve.

The Act, by section 2, gave the Society power to "form a body of rules and regulations for its own government under the inspection of the judges of the Province for the time being as Visitors of the said Society, and to appoint the six senior members or more of the present practitioners and the six senior members or more for the time being in all times to come (whereof His Majesty's Attorney-General and Solicitor-General for the time being shall be and be considered two), as Governor or Benchers of the said Society, and also to appoint a Librarian and a Treasurer."

For a time, the four senior members with the Attorney-General John White and the Solicitor-General Robert Isaac Dey Gray were the Benchers, and one of the Benchers became Treasurer annually according to seniority,[9] but in 1799 all the existing members of the Society being Barristers were made Benchers. At the same time a Rule was passed making five Benchers a quorum.

The Benchers met at convenient times and the business of the Society was conducted satisfactorily until after the fratricidal War of 1812 broke out. In 1803 by the Act of 43 George III. c. 3, U.C., the Lieutenant-Governor was authorized to give licences to not more than six persons, who should then be entitled to be

[9] White was Treasurer in 1797, Gray in 1798, 1799, 1800 and part of 1801; Angus Macdonell in 1801, 1802, 1803 and 1804; Attorney-General, Thomas Scott, in 1805; Solicitor-General, D'Arcy Boulton, in 1806, 1807, 1808, 1809, 1810 and part of 1811; Dr. William Warren Baldwin in 1811, 1812, 1813, 1814 and 1815. The Rule for the annual election of Treasurer was passed in 1819.

admitted by the Law Society—five persons, at least two of whom became eminent in the profession, were thus licensed.

In Michaelmas Term, 52 Geo. III., *i.e.* in the first week in October, 1811, a small meeting of Benchers was held in York at which appeared John Macdonell (the Attorney-General), Bartholomew Cannell Beardsley, and Dr. William Warren Baldwin. Baldwin, who was one of those who received a licence under the Act of 1803, was elected Treasurer, and the Convocation adjourned not to meet again for more than three years.

In Michaelmas Term, 53 Geo. III., Monday, November 9, 1812, before the Court of King's Bench (Scott, C.J., and Powell, J.), "Mr. Peters moved that Jonas Jones be admitted to the Bar as a Barrister at Law, he having conformed to the provisions in such case made and provided — withdrawn for want of affidavit." [10] On the following Wednesday, November 11, "Mr. Peters moved that Jonas Jones be admitted to the Bar as a Barrister at Law, he having conformed to the provisions of the law in such case made and provided. On this motion on behalf of Jonas Jones, a Student at Law, an affidavit was read purporting that he had given notice to two Benchers to attend in their place to form a quorum for his admission, but that they, Mr. Dickson and Mr. Stewart, declared it was not in their power to attend." The Court (Scott, C.J., Powell and Campbell, JJ.) ordered "that the Treasurer of the Bar (sic) Society, being a residing practitioner, do produce the Books of the Society and report to the Court the names of the students entitled by the time of their admission to be called if there was present a quorum of Benchers, and to shew cause why they should not respectively be called to the Bar without such Presentation." Saturday, November 14, the Court (Scott, C.J., and Campbell, J.) ordered "on the production of the Books of the Law Society and on

[10] Term Book No. 6, Court of King's Bench, now in the Ontario Archives, Queen's Park, Toronto.

"Mr. Peters" was William Birdseye Peters, who had obtained a licence under the Act of 1794, and had been formally called to the Bar in 1803, but never became a Bencher.

hearing the Report of the Treasurer of the said Society . . . that the following Gentlemen be admitted Barristers of this Honourable Court.

Jonas Jones, Esquire,
George Ridout,
John B. Robinson,
Christopher Alex'r Haggerman."

Jonas Jones, Esq., being in Court took the oath, etc."

In Hilary Term, 53 Geo. III., Monday, January 4, 1813, before the Full Court of three Judges, "George Ridout, Esquire, and John B. Robinson, Esquire, being admitted to the Bar by the Court last term, appear and take the usual oaths and subscribe the respective Rolls as Barristers and Attornies."

In Easter Term 53 Geo. III., Friday, April 9, 1813, before the Full Court of three Judges, "Archd. McLean, Esq., took the oath, &c., and was admitted Barrister of this Honble. Court."

In Trinity Term, 53 Geo. III., Friday, July 9, 1813, before the Full Court of three Judges, "David Jones, Esq., having produced his Indentures with Certificate and Affidavit of service, was admitted and sworn as Attorney and also admitted Barrister of this Honourable Court, it appearing to the Court from the Declaration of Mr. Baldwin, Treasurer of the Law Society, that he stands upon the Books of the Society, and he is admitted to practise accordingly."[11]

No other Canadians were ever admitted as Barristers in this way by the Court; the Benchers resumed their meetings after the War in Hilary Term, 55 Geo. III., Saturday, February 25, 1815. At that meeting "John Beverley Robinson . . . applied to be admitted a Barrister of the Province: and hav-

[11] The six persons so admitted by the Court signed the Rolls:

Name.	Barristers' Roll.	Attorneys' Roll.
Jonas Jones	1812, Nov. 14	1812, Nov. 6
George Ridout	1813, Jan. 4	1813, Jan. 4
John B. Robinson	1813, Jan. 4	1813, Jan. 4
Christopher A. Hagerman	1813, Jan. 16	1813, Jan. 4
Archibald McLean	1813, Apr. 13	1813, Apr. 9
David Jones	1813, July 9	1813, July 9

ing satisfied the Society that he had in every respect duly qualified himself and hath been of a proper standing on the Books," he was admitted a Barrister. At the same meeting were admitted as "Barristers of this Province" Jonas Jones, George Ridout and Christopher Alexander Hagerman. At a subsequent meeting during the same Term, at the Attorney-General's (D'Arcy Boulton's) Chambers, David Jones was called; and in Easter Term Archibald McLean received his call, and so these six were regularised.[12]

The power of the Court to admit to practise as Barristers, even those who were of the Bar of England, Ireland, Scotland or the British North American Provinces, was taken away in 1822, since which time the only way for anyone to be permitted to practise as a Barrister in an Ontario Court is through Call by the Law Society of Upper Canada.[13]

[12] From the original records of the Law Society at Osgoode Hall, Toronto. So far as I am aware the facts here set out have not been noticed by any previous writer.

[13] The Statute depriving the Court of all right to admit a Barrister is (1822), 2 Geo. IV., c. 5; it transferred the power to the Law Society. One de Sousa, a member of the English Bar, some thirty-five years ago set up a claim to be entitled to practise at our Bar without call by the Law Society, but failed: *In re de Sousa* (1885), 9 O. R. 39; he applied to the Judicial Committee of the Privy Council for leave to appeal, but leave was refused. "Their Lordships consider this an exceedingly plain case," (1885), 1 T. L. R. 597; S. C. 11 Leg. Obs. 497. The Court before the right so to admit was taken away admitted the following:—

	Name.	Qualification	Call by Law Society.
1801	James Woods	Barrister, etc., Lower Canada	April 13, 1801
1808	James Cartwright	Barrister, etc., Lower Canada	July , 1808
1819	Thomas Taylor	Barrister, England	Jan. 15, 1819
1821	John Rolph	Barrister, England	Nov. , 1821

(In this case the Benchers rejected an application by Dr. Rolph until he produced a certificate of admission by the Court of King's Bench.)

The following being Attorneys-General, members of the English Bar, were members and Benchers of the Law Society *ex officio* by the Judicature Act of 1794: Thomas Scott, joined Law Society, July, 1801; William Firth, joined Law Society, November 14th, 1807. John White was one of the original members, 1797, all other Attorneys-General have been our own product, except Robert Sympson Jameson, and he joined the Law Society on his appointment as Attorney-General, 1833; all the Solicitors-General have been our own product—an exception to these statements may be considered D'Arcy Boulton, Attorney-General, 1814-1818, Solicitor-General, 1805-1814; he was an Englishman who received a licence under the Act of 1803, 43 Geo. III., c. 3 (U.C.).

That the Court had the right to admit as an Attorney there can be no doubt: the Judicature Act of 1794 gave to the Court "all such powers and authorities as by the law of England are incident to a Superior Court of civil and criminal jurisdiction." For centuries the three Superior Courts in England, King's Bench, Common Bench and Exchequer, had admitted Attornies; and on the repeal in 1797 of the Quebec Ordinance of 1785, there can be no doubt of the power of the Upper Canadian Court to admit as Attorney. This was never taken away, and the necessity of a Certificate of Fitness by the Law Society before admission did not appear until 1857.[14]

The profession of Barrister was on an entirely different footing. All Barristers in England received their Call from one of the Inns of Court, the Inner Temple, the Middle Temple, Lincoln's Inn and Gray's Inn. The origin of these Inns of Court and of their authority is obscure; but it is certain that no Court in England could call to the Bar—nor could any Court compel the admission of anyone to any of the Inns or the Call by any of the Inns to the Bar.[15] Neither at the Common Law nor by Statute had the Court of King's Bench in Upper Canada the right to act as it did in 1812 and 1813.

In 1815 an Act was passed by the Legislature on the application of the Benchers, which statute ratified the acts of the Benchers in calling to the Bar, etc.; but while those persons whose names were entered on the Rolls of the Court as Attorneys had their admis-

[14] (1857), 20 Vict., c. 63 (Can.). Originally in England an attorney was appointed under the Great Seal, but the Statute of Westminster II. (1285), 13 Edw. I., by c. 10, enabled everyone to make an attorney for himself. Seven years later an Act was passed directing the Court of Common Pleas to provide a certain number of attorneys in each County. In 1402 the Act, 4 Henry IV., c. 18, provided that all attorneys should be examined by the Justices, and only those received who were "good and virtuous and of good fame"—these virtues are still considered requisites in the "lower branch of the profession." As to the admission, etc., of attorneys at the time of our Judicature Act of 1794, see Blackstone Commentaries, Book III., p. 26 (1st ed., 1768).

[15] Those interested cannot do better than read the cases: Booreman's Case, March Rep.; Townsend's Case, 2 T. Raymond 69; Rex ex rel. Hart v. Gray's Inn, 1 Doug. 353, and Rex v. Lincoln's Inn, 4 B. & C. 855, 7 D. & L. 351.

sion confirmed, there was no confirmation of the admissions as Barristers by the Court.[16]

If there had been power the reason was sufficient for the exercise by the Court of the power of calling students to the Bar which was the prerogative solely of the Benchers. John White was dead, killed in a duel (1800); Robert Isaac Dey Gray was dead, drowned in the "Speedy" disaster (1806), as was Angus Macdonell; Walter Roe, who had never attended a meeting since 1797, was dead, drowned in a shallow pool; James Clark was dead — he had not attended a meeting since 1802, and he got into trouble in 1803; Christopher Robinson was dead (1798); Timothy Thompson was busy in the Newcastle District with the Militia; Nicholas Hagerman had been at a meeting in 1811, but he was also busy at Adolphustown; Allan McLean was also with the Militia at Kingston; William Dummer Powell, Jr., was dead (1803), and his body lying "in the Presbyterian burying ground at Stamford, Dorchester"; Alexander Stewart was living, but could not attend; Bartholomew Cannell Beardsley was probably available; William Weekes was dead (1806), killed in a duel by his brother Barrister William Dickson; Jacob Farrand was dead (1803). Samuel Sherwood lived in the very easternmost part of the Province; John McKay seems never to have taken any part in the proceedings of the Society; Thomas Scott had become Chief Justice; D'Arcy Boulton, the Solicitor-General, was a prisoner of war in France; William Dickson was an active soldier (and was taken prisoner); William Firth had gone to England; Dr. William Warren Baldwin was available, he was practising in York; but the gallant John Macdonell, the young Attorney-General, had met a hero's fate on that October day in 1812 when the exultant invader was hurled back beaten and humiliated. From that list where was the quorum to come from?

[16] See this curious Act (1915), 55 Geo. III., c. 3 (U.C.).

And those who were thus called were not unworthy.

John Beverley Robinson, who had distinguished himself on Queenston Heights, as he was afterwards to distinguish himself in the Court as Barrister and Judge, and in the Legislature as debater and statesman. He became Acting Attorney-General November 19, 1812, and carried with credit the terrible burden of prosecutions for treason and other offences until the return of D'Arcy Boulton in the latter part of 1814 relieved him of the load; as Solicitor-General, 1815-1818; Attorney-General, 1818-1828, and Chief Justice of the Province, 1829-1862, he won the approbation of all competent observers.[17]

Jonas Jones, the son of a United Empire Loyalist, when the war broke out became a cavalry officer; he fought at Ogdensburg and elsewhere. Called to the Bar he became an active practitioner after the War, and as lawyer and politician he neither asked nor gave quarter. He was made a Justice of the King's Bench 1837, and showed himself a useful Judge—he died suddenly in 1848.

Christopher Alexander Hagerman, also the son of a U. E. L., took an active part throughout the whole war. After the war his career practically paralleled that of Jonas Jones: he was one of the most eloquent

[17] The appointment of John Beverley Robinson as Attorney-General (even temporarily) may have given him the right of audience in the Courts when representing the Crown. There is nothing in the Statutes limiting the Common Law Prerogatives of the Crown, and one of these was the right of being represented in every Court by attorney—the fact that such attorney had no right to appear in that Court in any other capacity is immaterial. See *Paddock* v. *Forrester* (1840), 1 M. & Gr. 583, and notes on pp. 587-589; *cf. R.* v. *Austen*, 8 Price 142; *Attorney-General* v. *Brown* (1818), 1 Swans. 265. Consequently there does not seem to be any necessity for an Attorney-General to be a member of the Bar in order that he may be entitled to be heard in Crown cases. But Robinson before his call by the Law Society took civil briefs as well, *e.g.*, in the *cause célèbre Empey* v. *Doyle*. Moreover, the Law Society's Act contains a provision that the six senior members or more, "whereof His Majesty's Attorney-General and Solicitor-General shall be and be considered two, should be Benchers or Governors of the Law Society." This would seem to place an Attorney-General on a par with any member of the Law Society, and it might well remove the necessity of call by the Law Society during the tenure of office. Thomas Scott and William Firth, the two English Barristers who became Attorneys-General, were not formally called by the Law Society, although they are entered as members and Benchers.

men our Bar has ever seen; he became Solicitor-General 1829, Attorney-General 1837, Justice of the Queen's Bench 1840, and died 1847.

George Ridout is less well known; he was a lawyer of good parts and became Judge of the Niagara District Court. Not being able to follow Francis Bond Head in all his measures, he was dismissed from his position as Judge, as well as from his colonelcy in the 2nd York Militia.[18] He was several times Treasurer of the Law Society.

David Jones became a respectable practitioner in the eastern part of the Province.

Archibald McLean, born in the Eastern District of Upper Canada, educated in Dr. Strachan's celebrated school at Cornwall, while still a student at law he went to the front to meet the American invader. A Lieutenant in the 3rd York Militia, it was to him that the agonized cry of the stricken John Macdonell came, "Archie, help me." After serving with honour through the war, he settled in Cornwall and practised his profession. Twice speaker of the House of Assembly, he removed to Toronto and again took up arms in the troubled times of 1837-8. A Judge of the King's Bench 1837, of the Common Pleas 1850, the Queen's Bench 1856, Chief Justice of Upper Canada 1862, he became presiding Judge of the Court of Error and Appeal 1863 and died in 1865.

When all is said, the old truth remains, *inter arma silent leges.*

William Renwick Riddell.

[18] See Dent's History of the Rebellion 1837-8.

THE SOLICITOR-GENERAL TRIED FOR MURDER

By William Renwick Riddell, LL.D., F.R.S. Can., &c.,
Justice of Supreme Court of Ontario.

In Trinity Term, 57 George III., on the first day of Term, Monday, July 7, 1817, the Court of King's Bench for the Province of Upper Canada [1] sat to hear "Motions in Term."

The Court was composed of "His Honour the Chief Justice" [2] William Dummer Powell, and Mr. Justice Campbell,[3] the former born in Boston, Massachusetts, of a wealthy Loyalist family, who never in youth expected to be obliged to earn a living by the drudgery of law, and the latter born in Scotland, who came to this continent a private in a Highland Regiment, and who becoming a prisoner by Cornwallis' surrender at Yorktown, after the war made his way to Nova Scotia, and was called to the Bar of that province. Powell had succeeded Thomas Scott in the previous year,[4] and no one had yet been appointed to the third place in the Court [5] — this did not at all interfere with the performance of the functions of the Court, for many times the Court had sat in Banc with but two Judges, and occasionally with but one.[6]

[1] This was the name given to the Court by the Statute (1794) 34 Geo. III. c. 2, s. 1 (U.C.).

[2] The title "His Honor," "Your Honor," etc., was given to the Superior Court judges until the time of Chief Justice Robinson, *e.g.* I find (looking in the Term Books almost at random), Chief Justice Campbell styled "His Honor the Chief Justice," June 21st, 1827, Term Book, K. B., No. 9.

[3] Afterwards Sir William Campbell, Chief Justice of Upper Canada, the first of our judges to be knighted.

[4] His patent was dated, October 1st, 1816; he was sworn in as Chief Justice, November 4th, 1816; the curt note appears in Term Book No. 6, under that date: "Mem. Mr. Justice Powell sworn in Chief Justice."

[5] D'Arcy Boulton, the Attorney-General, received the appointment, February 12th, 1818.

[6] The well-known Mr. Justice Willis refused to sit in a Court composed of but two judges, in 1828; and Mr. Justice Sherwood went on without him to do formal acts "in Term"—the Judicial Committee

The Court sat in the Parliament Buildings, which had been built to replace those burned by the Americans on their capture of Toronto in 1813—they were on the same site as the former on the south side of Front Street, a little east of Berkeley Street, where now the Gas Company's buildings stand.

Out of the five Motions made on the first day of term, four were made by Henry John Boulton, son of the Attorney-General D'Arcy Boulton.

Born at Little Holland House, Kensington, in 1790, he was called to the Bar by the Law Society of Upper Canada in 1816.[7] The young barrister got at once into active practice, beginning with "motions of course"; such as motions for judgment against the *Casual Ejector*,[8] for payment by the plaintiff to a judgment debtor (whom he kept in gaol under a *ca. sa.*) of five shillings subsistence money[9] and the like, and

of the Privy Council held that such a practice was perfectly valid and that Willis was wrong. From a list made up on June 19th, 1828, by Mr. James E. Small, Deputy Clerk of the Crown, for the information of the Executive Council, it appears that up to that time out of the 135 terms of the Count of King's Bench, 56 only had been held by the Chief Justice and puisne judges; that 59 terms had been held by a Chief Justice and one puisne judge; that 15 had been held by two puisne judges, and 5 by one puisne judge alone.

[7] In Term Book No. 6, under date, Wednesday, November 6th, 1816, appears the entry: "Henry John Boulton, Esquire, took the oaths and was admitted a Barrister of this Honorable Court." He became a student at law on the Books of the Law Society of Upper Canada in Hilary Term, 48 Geo. III., January, 9th, 1808, along with John Beverley Robinson and George Ridout, and was articled to his father. He was called to the Bar by the Law Society of Upper Canada, Michaelmas Term, 57 Geo. III, November 6th, 1816, and was sworn in before the Court the same day.

He had been studying law in England in 1815 and 1816, but was not called until later, when he became a member of the Middle Temple. It is probably because he intended becoming a member of the English Bar that he did not become an attorney or solicitor (Mr. Henry C. R. Becher of London, U.C., had to have his name struck off the Roll of attorney before he could be called to the English Bar. See my *Legal Profession in Upper Canada*, p. 24).

[8] For this curious practice consult Blackstone's Commentaries, Book 3, p. 202. The first motion made by Boulton was in *Doe ex dem. Huffman* v. *Roe*, November 12th, 1816, Mich. Term, 57 Geo. III.

[9] The delightful practice of keeping a debtor in gaol (where he cannot possibly earn anything), until he pays his debt, was one of the anomalies of the Common Law.

The unfortunate defendant had a judgment entered against him, and the plaintiff caused a writ of *ca. sa.* to be issued under the then existing practice, under which the defendant was arrested by the

working up through the gamut of cases, so that by Trinity Term, 57 George III., he had a good grasp of the practice and was a very popular counsel.

On Friday, July 11, he was counsel in six out of the fifteen Motions, no other counsel having more than four. The Court adjourned until Monday, July 14, and on that day his friend John Breakenridge [10] moved on his behalf that he might be brought from gaol.

sheriff and committed to the common gaol till he should pay the debt—this "arrest on final process" was a not unusual proceeding. The District should not be called upon to support a debtor in gaol and often the debtor himself could not. Much suffering was the result as any reader of Dickens will have seen: Mr. Jingle's lot was not unique. Accordingly the Provincial Act was passed (1805), 45 Geo. III. c. 7 (U.C.), which provided "that if any prisoner in execution for debt shall apply to the Court whence such execution issued and make oath that he or she is not worth five pounds, the plaintiff at whose suit he or she is detained, shall be ordered by the Court . . . to pay to the defendant . . . the sum of five shillings weekly maintenance . . . in advance . . . on failure of which the Court . . . shall order the defendant to be released." Many stories were told of releases under this Act—one of the favourites and one I have heard from old Canadians a score of times, is that after an order of this kind had been made, the plaintiff one morning unfortunately paid as part of the five shillings, a bad halfpenny, whereupon, the defendant, being in the Cobourg gaol, applied to the Court, and the Court was forced to release him from custody. There is much virtue in a "shall."

The Court went so far as to decide that it was no excuse for the non-payment of the allowance that the defendant had become possessed of property subsequent to his obtaining his order for allowance: *Williams* v. *Crosby* (1823), Taylor, 16. But where a defendant had applied to the Court for his release, and, expecting to succeed in this application, had while the application was pending, refused to accept the weekly allowance, he was not allowed the arrears when his application failed: *Moran* v. *Maloy* (1827), Taylor, 563; *ignorantia legis neminem excusat.* It appears from the Term Book, Hilary Term, 7 George IV., January 2nd, 1827, that this judgment was given by the Full Court, Campbell, C.J., Boulton and Sherwood, JJ., and that the defendant lost six weeks' allowance by his caution.

The statute of 1822, 2 Geo. IV. c. 8 (U.C.), which allowed interrogatories to be exhibited to a defendant in execution, which he was obliged to answer, put an end to much fraudulent concealment of property.

[10] Admitted on the Books of the Law Society, Saturday, April 26th, 1815 (the first meeting since before the War of 1812), as of Easter Term, 52 Geo. III. (April, 1812), called April 19th, 1817, Easter Term, 57 Geo. III. On April 19th, 1817, the Term Book, No. 6, of the K.B. shows: "John Breakenridge, Esquire, took the oaths and was admitted a Barrister of this Honourable Court." The motion for his friend Boulton was Breakenridge's first Brief.

"The King agst. Henry J. Boulton, Esq.	For Murder. Motion for a Writ of Habeas Corpus to bring up the Prisoner.

Granted. Breakenridge,
Writ Issued. Coun. for Pr.

The gaoler returned the writ and brought the prisoner, who was admitted to bail and bound in recognizance for his appearance at the next Assizes to answer to a charge of murder or any other matter that is then brought against him—himself in £500—his two sureties, Mr. D'Arcy Boulton and Mr. MacCaulay, in £250 each." [11]

From leading counsel to prisoner charged with murder was an amazing change; yet nothing was more natural in the existing state of society—he had been concerned in a duel which terminated fatally.

The important parts of the story are short and simple [12] — the leading families of Ridout and Jarvis were at variance through a misunderstanding aggravated by the tongue of an unwise and impulsive woman. Young John Ridout, a law student [13] not yet twenty-one, assaulted Samuel Peters Jarvis,[14] a barrister; a challenge naturally and necessarily followed; Jarvis chose Boulton as his second and the principals and their seconds met early at Chief Justice Elmsley's barn, not far from the north-west corner of Yonge and College Streets; and Ridout was slain.[15]

[11] Mr. D'Arcy Boulton was D'Arcy Boulton, Jr., the brother of the prisoners, called in 1807. Mr. MacCaulay was Robert Macaulay, called in 1820.

[12] I have given more details in an article, *The Duel in Early Upper Canada*, 35 CANADIAN LAW TIMES, for 1915, pp. 726, *sqq*. It should be said that all the facts are from existing documents, some of them contemporaneous, some of a slightly later date.

[13] He was admitted on the Books of the Law Society as a student-at-law, January 15th, 1817; he was articled to his elder brother George.

[14] Called in Trinity Term, 55 Geo. III., July, 1815, afterwards son-in-law of Chief Justice Powell; grandfather of Commodore Æmilius Jarvis of Toronto.

[15] Perhaps it may be well to set out a little at length the facts of this duel: Waiting at the barn until a shower was over, the principals were placed eight yards apart; it was agreed that the signal should be "one, two, three, fire," but that on no account was either party to

By the law of England the surviving principal and the seconds were all guilty of murder—and all three were arrested—Jarvis remained in gaol until his trial in October, but as we have seen, Boulton was released on bail.

He resumed his active practice at the Bar as early as Wednesday, July 16, 1817, but for a Term he seems to have lost his popularity as a counsel to some degree. There was indeed no obloquy attached by those in his own sphere to participate in a duel — in 1812 the Attorney-General and the Treasurer of the Law Society had fought a duel [16] on the Island (then the York Peninsula), fortunately a bloodless duel, John Macdonell surviving to find the death of a patriot on the bloody Heights of Queenston, and Dr. William Warren Baldwin to be for many fruitful years an ornament and advantage to the Law Society, the Profession and the Province.

And the Honourable William Dickson had killed his man in 1806 without at all losing caste or position.[17]

At the October York Assizes, Jarvis was arraigned on a charge of murder and the seconds as accessories before the fact.

The presiding Judge was the Chief Justice: it was at that time and for long after the custom for prosecutions to be conducted by the Attorney-General or Solicitor-General, who were thereby enabled to eke out their shamefully inadequate salaries. But D'Arcy

raise his pistol till the word "fire." Mr. Small, Ridout's second, pronounced "one," and was in the act of pronouncing "two" when Ridout raised his pistol and fired at Jarvis; he then left the ground in a direction away from Jarvis. Whether this was due to nervousness or not, Jarvis insisted to the end of his life that it was a deliberate attempt at foul play. Ridout was rebuked by his second and directed to take his place. He said: "Yes I will, but give me another pistol;" a loaded pistol was given him, but after a conference between the seconds, taken away again, as "Jarvis was entitled to his shot." The second pronounced the signal agreed upon and Jarvis fired. Ridout fell, was carried into Chief Justice Elmsley's barn and there died in a very short time. The pistols used on this occasion are in the possession of Æmilius Jarvis, Esq., of Toronto, grandson of the surviving principal. They are long and heavy, carry a large bullet, and are most deadly weapons.

[16] See the story of this duel in my article "Another Duel in Early Upper Canada," 36 CANADIAN LAW TIMES, August, 1916, pp. 604, sqq.

[17] See the article mentioned in note 12.

Boulton, Attorney-General, his son being involved, asked and received permission to abstain from the case. John Beverley Robinson, the Solicitor-General, was in England and the presiding Judge conducted the prosecution somewhat after the very early English practice. The prisoner of course had no counsel—not for quarter of a century after this time were those charged with a felony entitled to make their defence by counsel.[18]

But as a great Chief Justice said on another trial of the same kind: "Juries have not been known to convict when all was fair":[19] all was fair and Jarvis was acquitted. This acquittal, of course, released the alleged accessories—if no crime has been committed by the principal, there can be no accessory.[20]

Boulton had spent several years in England, as he says, "for the purpose not merely of being there called to the Bar, but also of obtaining that kind of knowledge I fondly hoped would give me some little prominence among my brethren in this Province, and which might be the basis upon which to found a well-grounded expectation of advancement in the Colonial Judicature." [21]

When early in 1818 his father became a Justice of the King's Bench, John Beverley Robinson became Attorney-General and Henry John Boulton became acting Solicitor-General; and two years afterwards (1820) he received the permanent appointment.

The Nemesis of the fatal duel was destined again to trouble him. At the York Assizes in April, 1828, Mr.

[18] (1841), 4 & 5 Vic. c. 24, s. 9 (Can.).

[19] Chief Justice John Beverley Robinson on the trial at Brockville, August 9th, 1833, of John Wilson (afterwards Justice of the Common Pleas), for the murder of Robert Lyon, a law student. See article mentioned in note 12.

[20] *Reg.* v. *Gregory* (1867), L. R. 1 C. C. R. 77. I find I have paraphrased Chief Baron Sir Fitzroy Kelly's language, p. 79: "There can be no accessory to a felony unless a felony has been committed."

[21] See his letter to Bathurst, York, U.C., 20th February, 1818, in which he asks for the Solicitor-Generalship in succession to John Beverley Robinson, who had become Attorney-General, Canadian Archives, Q. 324, Pt. II., p. 284.

Justice John Walpole Willis presided—he was in reality an equity lawyer and had no experience in and little knowledge of criminal law and procedure. Francis Collins, a well-known Radical, the editor of the *Canadian Freeman,* who had been indicted for criminal libel, appeared in Court and complained that the Attorney-General John Beverley Robinson was guilty of "foul partiality" in prosecuting him (Collins) on mere suppositions of libel while he allowed his friend Henry John Boulton to remain unprosecuted although he had confessed to "a crime that the law of England calls murder, committed ten or eleven years ago." There ensued painful scenes between Judge and Attorney-General:[22] but in the end the celebrated Robert Baldwin [23] was, with the Attorney-General's consent, permitted to lay a Bill of Indictment against Boulton for murder.[24] A True Bill was found and on Monday, April 14, 1828, Henry John Boulton, His Majesty's Solicitor-General for the Province of Upper Canada, was sent to the bar to be tried for his life on a charge

[22] It must be admitted that the judge was almost wholly to blame; he was quite ignorant of criminal law and practice, he had an overweening confidence in his own merits and judgment, and a perfect contempt for all Colonials and Colonial officials from the Lieutenant-Governor and Chief Justice down.

[23] The reputation of Robert Baldwin, great during his lifetime, has steadily increased. His father and he seem to have reversed the usual role—the son being far more prudent and conservative than the father, while as strong an advocate of constitutional and responsible government. Anything advocated by Robert Baldwin was at once accepted by all as a sane and temperate measure, however it might fail to recommend itself on other grounds.

The fact that Robert Baldwin "threw off his gown" when Mr. Justice Willis refused to sit as part of a Court of less than three judges, is the only thing to induce belief that there was something in Willis' objection. Dr. Baldwin and Dr. Rolph were notorious partisans and Simon Washburn was a negligible quantity.

We may be perfectly confident that the prosecution of Boulton for murder was conducted with all due propriety and skill by Baldwin.

[24] It may seem odd that while Boulton could not be prosecuted as accessory before the fact to murder, he could be prosecuted for the principal offence itself. But that is perfectly logical—Jarvis not having committed murder, there could be no accessory; but that did not in law or in logic preclude the possibility of anyone else having committed a murder.

of murder before Mr. Justice Willis and by a jury of his countrymen.[25]

For two days the trial continued, the whole pitiful story was told over again, the jury were charged on law and fact—and in ten minutes returned with a verdict of Not Guilty—"all had been fair," and consequently what was by the law of the Province on the admitted facts a murder, was held to be no crime.[26]

It is all too obvious that the proceeding was not for the public good or to vindicate public justice —the whole prosecution was the outcome of political malignity. Those who complain of political unfairness in the present day should know that even the most vindictive of political invective of the present time is but as gentle chiding compared with the brutality of olden times.

The prosecution did Boulton no harm: he continued in his office until he was made Attorney-General on Robinson's elevation to the Bench in 1829. He held that office during the troublous times until 1833, when he was cashiered along with Hagerman, the Solicitor-General, after a spirited answer to the Colonial Secretary's dispatch.[27] He subsequently became Chief Justice of Newfoundland but failed in achieving success and resigned in 1838: he then returned to Upper Canada and was for some time a

[25] This trial took place in the same room as the trial ten years later of Lount and Matthews for High Treason. The Court House was built in 1824—as was the gaol—on a plot of land, Court House Square, on the north side of King Street east of Toronto Street. This Court House was the immediate predecessor of the Adelaide Street building, so familiar to the older members of the Bar, which itself gave way to the present building a few years ago.

[26] Had he been convicted there can be no doubt he would have received a pardon.

In the celebrated Sifton murder case in London some twenty years ago, a young man who had confessed to being an accessory before the fact to a murder, and had given evidence to that effect, received a pardon on the acquittal of the principal.

It would in Boulton's case have been the grossest wrong to punish a second while his principal went free.

[27] See on this episode my article on *The First and Futile Attempt to Create a King's Counsel in Upper Canada*, 40 CANADIAN LAW TIMES, February, 1920, p. 99 and notes.

member of the Union Parliament—his latter life was one of obscurity, the old issues were dead and the old champions forgotten.[28]

[28] The facts of the prosecution for murder and of Boulton's later life are well known—as to the bare facts Dent's account in *The Story of the Upper Canadian Rebellion*, Toronto, 1885, can, generally speaking, be relied on, but that otherwise excellent work is disfigured by gross partizanship; Dent's estimate of the motives, ability and honesty of those he mentions seems to depend almost wholly on their politics.

William Renwick Riddell.

A CRIMINAL CIRCUIT IN UPPER CANADA A CENTURY AGO

By William Renwick Riddell, LL.D., F.R.S., Can.,
Justice of the Supreme Court of Ontario.

More than a century ago the Province of Upper Canada was divided by the Judges of the Court of King's Bench into three Circuits, each of a number of District Towns; and the three Judges of that Court took each one Circuit twice a year by an arrangement made by themselves, and publicly announced. The Court of King's Bench was the only Superior Court in the Province, but it very seldom tried a criminal case; most of the charges of crime were tried before a Court of Oyer and Terminer and General Gaol Delivery, presided over by one of the Judges of the Court of King's Bench who received a Commission for that purpose—and the same Judge received a Commission of Assize and Nisi Prius empowering him to try civil cases. These commissions the Judge of Assize held "on Circuit," and together they enabled him to try all cases, civil and criminal. The Courts of Quarter Sessions of the Peace tried and disposed of many minor offences, but all of real importance came to the Assizes.[1]

After each Circuit, Spring and Fall, a century ago there was an established practice for the Assize Judge to make a formal Report in writing to the Lieutenant-Governor of the capital cases on his Circuit. Sometimes a full Report of all the criminal cases tried before him was made by the Judge.[2] From these

[1] Nominally the Courts of Quarter Sessions had jurisdiction over all felonies and misdemeanours; and many thousand of thieves, etc., were hanged by such courts in Tudor and Stewart times. But by the end of the 18th century, and for some time before, in practice, all capital charges went to the Assizes. There is no record of a Court of Quarter Sessions trying a capital felony in Canada.

[2] The Ordinance of the Province of Quebec (1789), 29 Geo. III., C. 3, passed April 30th, 1789, by sec. 4 provided "That on all trials to be had in either of the new Districts (Luneburg, Macklenburg, Nassau, Hesse, and Gaspé) before Commissioners of Oyer and Terminer or

Reports a good idea of the state of crime in the Province can be formed.[3]

In the Fall of 1820, Chief Justice Powell took the Eastern Circuit, *i.e.*, the Midland, Johnstown and Eastern Districts.

In the Midland District the Court sat at Kingston; and there were three convictions of capital felony. The first was for a crime continually recurring, a charge of which it is "easy to make, hard to prove but harder still to disprove," the hideous crime of rape. John McIntyre, a sapper and miner, with

General Gaol Delivery, when the Chief Justice of the Province (of Quebec) may happen not to be one, the execution of the sentence or judgment of the Court shall be suspended until the pleasure of the Governor . . . shall be signified . . ." And section 5 provides for a full report of indictment, evidence, etc., where the sentence extended to life or limb or more than twenty-five pounds sterling.

While after the formation of the Province there seems to have been no statutory or other obligation of a legal nature upon them so to do, it was the custom from the beginning of the separate provincial life of Upper Canada in 1792 (as before) for the trial judges to make a report to the Lieutenant-Governor upon every capital case in which a conviction was made and the prisoner sentenced to death.

In 1841 by the Act (1841) 4, 5 Vict., c. 24 (Can.), it was enacted, section 32, that from and after January 1, 1842, it should not be necessary that reports should be made to the Governor in the case of a prisoner convicted and sentenced to death, "any law, custom, or usage to the contrary notwithstanding." Thereafter it was not the custom to report unless a report was called for by the Gonrvement.

Two years after the formation of the Dominion of Canada the Act (1869) 42, 33 Vict. c. 29 (Dom.), by sec. 107, continued the provisions of the Act of 1841, but added that if the Judge thought the executive clemency should be extended to the prisoner, or if there were a point of law reserved in the case still undecided or "from any other cause it becomes necessary to delay the execution" the prisoner might be reprieved for a sufficient time.

Four years thereafter, by the Act ((1873) 36 Vic. c. 3 (Dom.), it was enacted that "the Judge before whom such prisoner has been convicted shall forthwith make a report of the case to the Secretary of State of Canada for the information of the Governor; and the day to be appointed for carrying the sentence into execution shall be such as in the opinion of the Judge will allow sufficient time for the signification of the Governor's pleasure before such day . . ." This was carried into the Consolidated Statutes of Canada (1886), c. 181, sec. 8, into the Code of 1892, 55, 56, Vic. c. 29, s. 937, and now appears in the Criminal Code (1906) c. 146, s. 1063.

[3] Many of these are preserved in the Archives at Ottawa in the Sundries Upper Canada. The information in this article is from the Sundries Upper Canada Series unless otherwise stated. In the Term Book the Assizes for the Fall of 1820 are fixed to begin as follows:—Cornwall, August 14; Brockville, August 21; Kingston, August 31. I have given these three in the reverse order as that is the order in the Chief Justice's reports.

three others went to the house of his comrade, Alexander Dick, where they found Dick's wife Nancy alone — the brutes overpowered her and three of them, including McIntyre, violated her.[4] The Chief Justice recommended that the law should take its course.[5] A subsequent petition from Alexander Dick and his wife in favour of McIntyre received no consideration at the hands of the Chief Justice; he said, "I cannot consistently with my sense of duty second the application of the injured party. . . . Example is necessary for the protection of females whose occupation retains them alone in their houses in the absence of their husbands, fathers and brothers"[6] — and McIntyre was hanged.

The second capital case was that of Thomas Yearns, "a visionary who spends most of his time wandering through the country in search of mines of gold and silver"; he had found some horses on a remote common and brought them to his brother's—the brother at once let them loose. The Chief Justice thought the evidence too equivocal to justify a capital conviction and recommended a pardon, which was promptly given to the unfortunate man; it was apparent that he had no real intention to steal—and moreover while the sentence of death was always pronounced for grand larceny,[7] the practice was to commute to banishment. Indeed John Beverley Robinson was able, when the question was raised in 1828, during the Willis controversy, to say that in his time

[4] About thirty years ago I defended four men from Campbellford who were all found guilty of an offence on all fours with this—the fourth as principal in the second degree. Mr. Justice Rose sentenced them all to the penitentiary for life.

[5] Rape was still a capital offence as it continued to be until the Moss Act in 1873, by which the Judge was given the power of sentencing to death or to imprisonment. This Act (1873), 36 Vic. c. 50 (Dom.) was due to the efforts of Thomas Moss, Q.C., afterwards Chief Justice of Ontario.

[6] Letter September 22, 1820, from Powell to the Governor's Secretary.

[7] This distinction between grand and petty larceny was abolished in the Annus Mirabilis of Canadian Criminal Legislation 1841, by the Statute 3, 4 Vic. c. 25, 52; the same Statute s. 3 made the punishment for simple larceny seven years' imprisonment or less, and by s. 29 for stealing of horses, cattle, etc., fourteen years or less.

in office, going back to 1812, there had been no executions for simple horse stealing.[8]

The third capital case at Kingston was that of Michael Conway (or Conoway). This man had been a very gallant soldier during the war of 1812-15, and on reciving his discharge had entered civil employment. He was otherwise without marked vicious tendency, but was given to drink, then an almost universal failing in Upper Canada. His employer sent him to town with a team of horses and a sleigh. Conway got drunk and sold the horses and sleigh, spending the proceeds in drink. The case was a perfectly plain one and he was convicted and sentenced to death. The Chief Justice, however, respited the execution until the pleasure of the Lieutenant-Governor should be known; he advised that the old soldier should not be hanged, but should be banished for life. Accordingly Conway received a pardon conditioned upon his removal from His Majesty's Dominions for the term of his natural life.[9]

The Chief Justice went also to Brockville to hold the Assizes for the Johnstown District — there also there were three capital convictions. The first was that of John Rees for horse-stealing; the Chief Justice reported that Rees was a practised offender, and added, "I submit his case as justifying the sacrifice of his life if any conviction of that offence can." As no record is extant of a pardon, absolute or conditional, it is almost certain that this practised horse thief was hanged.

The second was a very curious case: John Ducalon, "a child not eleven, small of that age, but of premature talent of mind and body, capable of being a dangerous instrument in the hands of others," was found guilty of horse stealing. He had made a confession and it was read against him on the trial; the Chief Justice

[8] See the papers relating to the removal of Mr. Justice John Walpole Willis, published by order of the (Imperial) House of Commons.

[9] Transportation was the usual punishment for such crimes in England at this time; but as transportation was practically impossible in Upper Canada, the Legislature in 1800 by the Act 40 Geo. III., c. 1, s. 5 (U. C.) substituted banishment from the province, etc.—this also ceased in 1841, 4, 5, Vic. c. 24, s. 20.

respited the execution for the consideration of the Judges if the confession of such a child should be read.[10] There is no record in the Term Books of any argument; in those days such matters were considered by the Judges in their private conferences; but as the Chief Justice recommended a pardon in any event, there can be no doubt that the child escaped punishment.

The third Brockville case was a very painful one —John Schaff was found guilty of stealing a steer for beef. At the Common Law the killing of an animal with intent to steal the carcass was a civil trespass only; but in 1741 the well known Waltham Black Act made it a felony punishable with death without the benefit of clergy.[11] The crime became rather common in Upper Canada during the war of 1812, owing to the demand for beef; those convicted of the offence, however, were not executed, but were banished. Concerning Schaff, the Chief Justice reported: "It is not usual on conviction for a first offence to execute, and the extremity of the distress of this man's family starving without this supply induced the jury who convicted him to recommend mercy in the most pressing way" —he was pardoned conditionally, *i.e.*, banished to the United States.

The Chief Justice also went to Cornwall to hold the Assizes for the Eastern District. There were no capital convictions at that place, but a very interesting case is reported, that of a Methodist Teacher convicted of solemnizing a marriage contrary to law. The report discloses a curious state of affairs in the Dis-

[10] The practice had grown up in England for the Judge presiding over a Court of Oyer and Terminer and Gaol Delivery if he had doubts as to the sufficiency of an indictment, evidence, etc., to reserve a case for the opinion of the judges—if the judges were of opinion that the prisoners should not have been convicted they recommended commutation or a pardon. This practice, which was without statutory warrant, was regularized in 1848 by the Crown Cases Act 11, 12, Vic. c. 78.

In Upper Canada the first Act was (1851) 14, 15 Vic. c. 13 (Can.); a further Act was passed in 1857, 20 Vic. c. 61 (Can.).

See my article, "New Trial at the Common Law," 26 Yale Law Journal (November, 1916), pp. 49, sqq. esp. p. 60. "New Trial in Present Practice," 27 do. do. (January, 1918), pp. 353, sqq. esp. p. 359.

[11] See my article "Criminal Law in Upper Canada a Century Ago," 10 Journal of Criminal Law and Criminology (February), 1820), pp. 516 sqq.

trict of Johnstown—the Chief Justice says, "a great proportion of the Magistracy of the District of Johnstown stand indicted for similar offence under circumstances which induced me to bail them in the expectation of a rescission of the law." He recommends the Lieutenant-Governor to hold the conviction of the Methodist Teacher "more in *terrorem* and to caution others." We shall leave the consideration of this case until another case of a similar kind is to be discussed.

Mr. Justice Campbell took the Home Circuit; at Niagara for the Niagara District, August 14, and Hamilton[12] (now Cobourg) for the District of Newcastle, September 18. At the Newcastle Assizes was tried an Indian lad, Negaunausing, ten years old, who had shot "a European boy, John Donaldson, of nearly the same age." He was a bright and intelligent lad; he quite understood what he was doing, and his nonage did not save him from conviction—*Malitia supplet aetatem.* He was sentenced to death.

Mr. Justice Campbell made a formal report; the case of the young Indian was taken up by Charles Fothergill[13] of Rice Lake and Port Hope,[14] and the

[12] Called after the Township in which it is situated; for sometime after the foundation of the present City of Hamilton there was a distinction made between Hamilton and Hamilton in the Gore District. The name Cobourg was well established by 1821, when the Sheriff received a charter for a Fair "in the Town of Cobourg in the Township of Hamil,-ton," August 2.

For a provision for sale of the old site after construction of a new Court House see the Statute (1836) 6 Wm. IV., c. 23 (U. C.), but that is another story.

[13] Charles Fothergill, J.P., was an Englishman of superior education; he had an elegant cottage at Port Hope and a residence on Rice Lake. He spoke against Robert Gourlay at the memorable meeting of the inhabitants of the Townships of Hope and Hamilton in 1818, which ended Gourlay's hope of success in the District of Newcastle. He became King's Printer in 1821, published the Gazette and the York Almanac; he, however, lost that situation in 1826 on account of his independent conduct in the House of Assembly in which he was Member for Durham. He was an accomplished naturalist and wrote several volumes of manuscript on the animals and birds of the continent. He supplied the celebrated artist, Bewick, with a horned owl stuffed, for illustration, and took an active part in an abortive scheme for a Museum and Institute of Natural History and Philosophy with Botanical and Zoological Gardens attached, to be placed at York (Toronto). See my "Life of Robert (Fleming) Gourlay," Ont. Hist. Soc. Papers and Records, Vol. 14 (1916), pp. 37, 60.

[14] The Indian name "Ganaraska" was replaced by "Smith's Creek," from the mill stream at whose mouth it was built—as Cobourg

matter again submitted to the Trial Judge for his opinion. He advised clemency; although the boy undoubtedly understood the act and intended the result, there were three reasons for mercy, his youth, his ignorance of the consequences to himself of the crime and the absence of any previous quarrel or ill will.

It was nearly a year before the pardon was decided upon; and the boy lay in gaol at Cobourg. When the pardon was granted, it was on condition that the chiefs of the tribe to which he belonged should give security that he would banish himself from Upper Canada for life. On this being transmitted to the Sheriff of the Newcastle District, John Spencer, he was in a quandary as to the form the security should take and wrote to Major Hillier.[15] How the matter was arranged does not appear; but it is quite certain that the boy was not hanged.[16]

Mr. Justice D'Arcy Boulton took the Western Circuit—the District of Gore, August 28, of London, September 7 (the Court still sat at Charlotteville) and the Western District at Sandwich, September 18.

The only case reported was that of Reuben Crandell, "Elder" Crandell of the Township of Malahide, an "Anabaptist Preacher," convicted for solemnizing matrimony unlawfully and sentenced to banishment for 14 years.

At the Common Law a marriage in England was valid only if solemnized in the presence of a "mass"

seven miles east was sometimes known as Perry's Creek—the village had the name Toronto for a short time, but when made a port of entry the permanent name Port Hope (from the township in which it was situated) displaced all others (1820-21).

[15] The letter is dated Hamilton, October 26th, 1821 — Can. Archives, Sundries U. C., 1821. Several writers have been misled by want of caution in distinguishing the two Hamiltons.

[16] It is one of my earlier recollections seeing the crowd of people around Cobourg gaol at the "Court House" (formerly Amherst village) on the hill at the north of the town, to witness the execution of Dr. King for the murder of his wife by arsenical poisoning; the trees giving on the goal yard were crowded with men. This was the first (and only) execution at Cobourg.

The Indian was possibly of the Mississaugua Band of the Bay of Quinté, who a few years later were settled in the Township of Alnwick—Chippewas, they are sometimes called; or he may have been one of the "Rice Lake Band," what is now the Hiawatha Band from the north shore of Rice Lake.

priest, episcopally ordained—and when at the Reformation the former connection with the Church of Rome was severed, but the Church of England retained the Orders of Priest and Deacon, it was considered that the presence of a priest or deacon was necessary to a valid marriage.[17]

The laws of England by the Royal Proclamation of 1763 and the Quebec Act of 1774, 14 George III. c. 83 (Imp.), were the laws of this Province when first organized, 1791-2 (and in the same territory from 1774), except that the civil law of French Canada was in force in most civil matters.[18] That law did not help Protestants; and consequently those desiring to be married applied to the chaplains at the military posts; sometimes there was no chaplain and the surgeon or adjutant performed the ceremony. These marriages were recognized to be irregular; and the Legislature in 1793 passed an Act[19] validating them; and authorizing magistrates to solemnize marriages in future until there should be five parsons of the Church of England in the District. This was not wholly satisfactory, and in 1797 another Act was passed[20] making it lawful for a minister of any congregation or religious community professing to be members of the Church of Scotland or Lutherans or Calvinists to celebrate the ceremony of marriage for members of his own congregation or religious community on first

[17] As I purpose writing an article on the Marriage Laws of Upper Canada, I do not here give an exhaustive account of these laws and the reason for them.

Those interested in the English law of marriage cannot do better than read the interesting cases *Reg.* v. *Mills*, 10 Cl. & F. 534; *Beamish* v. *Beamish*, 9 H. L. Cas. 274.

[18] Marriage was in French Canada a matter of canonical law; to be a valid civil marriage there must be a religious marriage and the decree of the Supreme Council of Quebec, June 12, 1741, enjoined the curés to observe the Canon Law in marriage. By the Canon Law as by the Common Law, a marriage to be valid required the presence of a priest.

[19] (1793) 33 Geo. III., c. 5 (U. C.).

[20] (1798) 38 Geo. III., c. 4 (U. C.); this Act was really passed in 1797 (see report of Mr. Justice Elmsley, Canadian Archives, Q. 284, p. 51)—and reserved for the Royal Pleasure. The Royal Assent was promulgated by Proclamation by Peter Russell, Administrator of the Government of Upper Canada, December 29, 1798, 38 Geo. III.

obtaining a certificate in the statutory form from the Court of Quarter Sessions of his District. Such ministers were, however, by section 4, forbidden to celebrate the ceremony except on the publications of banns for three successive Sundays or the production of a marriage licence. These were the only persons outside of priests allowed by the law a century ago to celebrate matrimony, and so it remained for ten years longer.[21]

It was an offence in the English law for any person, however qualified, to perform the ceremony without banns or licence; and anyone "knowingly and wilfully so offending" was on conviction to "be deemed and adjudged to be guilty of felony and . . . transported . . . for fourteen years."[22] This law was in force in Upper Canada except that for transportation, the provincial statute substituted banishment.[23] It was, moreover, a Common Law misdemeanour for anyone who was not duly qualified, to perform the marriage service.

Crandell had formerly lived in the Township of Cramahe in the County of Northumberland and Dis-

[21] In 1830 by the Act 2 Geo. IV., c. 36 (U. C.) clergymen and ministers of the Church of Scotland, Lutherans, Presbyterians, Congregationalists, Baptists, Independents, Methodists, Menonists, Tunkers and Moravians were empowered on taking out a licence from the Court of Quarter Sessions—the list was extended by the Act (1857) 20 Vic. c. 66 (Can.), and the Act (1896) 59 Vic. c. 39 (Ont.), but marriage is not yet "wide open." See *Rex* v. *Brown* (1908), 17 O. L. R. 197.

[22] (1753) 26 Geo. II., c. 33, s. 8 (Imp.).

[23] The Royal Proclamation of 1763 and the Quebec Act of 1774 were probably effective to introduce the Act of 26 Geo. II. 33, but all doubt was removed by the Provincial Act of (1800) 40 Geo. III, c. 1, (U. C.). The Act prescribing banishment in the stead of transportation was the last named Act of 1800, 40 Geo. III., c. 1, s. 5. Curiously enough the provisions in the Act of 22 Geo. II., s. 18, that the Act should not apply "to any marriage solemnized beyond the seas" was not considered to prevent its being in force in Upper Canada.

Professor Newman in an historical article in the Baptist Year Book for 1900, p. 25, says that Crandell came a young evangelist from the United States about 1794, and settled in Hallowell (now Picton) Prince Edward County.

As a result of his labours a church was organized about 1795, of which the Haldimand church is the perpetuation. Within the next few years the Cramahe, Rawdon and Thurlow churches were organized in the same region and as early as 1803 these feeble churches formed the Thurlow association.

trict of Newcastle, and was there the minister of a congregation of Baptists—they called themselves "Calvinists" because they had "cordially embraced those five grand points of gospel doctrine which Calvin manfully defended against the errors of Popery, viz.: Predestination, particular redemption, effectual vocation, justification by the imputed righteousness of Christ, and the perseverance of the Saints to glory."[24] Crandell appeared before the Court of Quarter Sessions for the District of Newcastle, April 9, 1805, and obtained the qualifying certificate as Minister of the Religious Congregation of Calvinists—and thereupon was enabled to celebrate the marriage ceremony between persons of his own Congregation within that District.[25] But he removed to another District and performed the ceremony there; this in itself rendered him liable to prosecution for a misdemeanour at the Common Law;[26] he had, however acted without banns or marriage licence, and it was decided to prosecute him under the Act of 1753.

Mr. Justice Boulton not only reprieved Crandell: he released him that he might submit a petition for clemency to the Lieutenant-Governor in person. He reported the case, saying that Crandell was of good character, but ignorant and misinformed as to the law, and as no one had so far suffered punishment for

The name "Anabaptist" was very frequently used to designate the religious communion now generally called Baptist—usage now restricts the former appellation to the people of continental Europe of the 16th century and those who were immediately influenced by them. There were in England two schools of Baptists —the Arminian and the Calvinists—most of those in Canada have been Calvinists like Crandell and the Clinton Church. I have to thank the Rev. Dr. Gilmour, of McMaster University, for some of the above information. (Crandell's name is sometimes spelled Crandall).

[24] See the address to Sir Peregrine Maitland, Lieutenant-Governor of Upper Canada, of the Baptist Church in Clinton, District of Niagara, signed by John Upfold, pastor, and Jacob Beam, Church Clerk; dated at Clinton, January 16, 1821. Canadian Archives, Sundries, Upper Canada, 1821.

[25] See Note 4 to my article, "Some Early Legislation and Legislators in Upper Canada," 33 CANADIAN LAW TIMES, Second Paper, February, 1913, p. 103.

[26] This was sometimes done by information *ex officio*—see for one case in York (Toronto) in 1802, Note 5 to the article mentioned above in Note (25). Sometimes, however, were prosecuted by indictment.

this offence (as he learned from John Beverley Robinson, the Attorney-General who had prosecuted for the Crown),[27] he recommended mercy. The Attorney-General was not quite so favourable; he pointed out that the conviction was not for officiating without legal qualifications, but for violation of the Statute of 26 George II. c. 33, and that the Judge had no discretion in the matter. "This man's case is distinct from that of Mr. Cook or Mr. Ryan, and the other preachers complained of . . . they assuming an authority which they had not, pretended to solemnize matrimony pursuing the legal forms . . . this man . . . solemnized matrimony in a manner that could not have been legal whatever was his authority."[28]

Crandell did not delay: on the very day of his conviction, September 9, he drew up a Petition for a Pardon, in which he said that he had been ignorant of the law until the conviction of Henry Ryan, and since that time he had desisted. The Grand Jurors, some of whom were Methodists, but some members of the Church of England, joined in a representation that though they believed Crandell to be an ignorant man, he was useful to the neighbourhood—and they recommended clemency. It is satisfactory to know that he received a free and unconditional pardon.[29]

[27] By the Term Book of the Court of King's Bench it appears that the Attorney-General took the Crown business at the Niagara Assizes and on all the Western Circuit, while the Solicitor-Genreal, Henry John Boulton, took the Newcastle Assizes; presumably he took the Eastern Circuit also.

[28] Both these letters are dated from Charlotteville, September 10, 1820, that of the Judge to Maitland, that of the Attorney-General to Major Hillier, Maitland's secretary. The Attorney-General added, "he goes to York, I believe, with much interest made in his favour"; he thought Crandell's character "indifferent," but that remark seems unjust.

[29] There were at this time in Upper Canada about 600 regular Baptist Communicants, but several thousand people attended the Baptist churches. In addition to the Clinton Conference there was an Association eastward of York by the name of the Haldimand Baptist Association consisting of six churches whose ministers were licensed to celebrate matrimony. See the address of the Baptist Church referred to in Note 24, *supra*.

Mr. Cook, mentioned by the Attorney-General, was convicted at the Niagara Fall Assizes, 1819, before Powell, C.J.; he was not known as a Minister of any sect, and produced no credentials—the jury made a strong recommendation to mercy, which the Court did not second, but nevertheless Cook received a pardon.[30]

Mr. Ryan was the well-known Elder Henry Ryan, the Boanerges of early Canadian Methodism—I have not yet been able to find any official record of his conviction, but as the offence was not capital, it might not be specially reported.

There were two bodies of Methodists in the Province at this time, the Methodist Episcopal in connec-

[30] See Powell's Report, August, 1819, Canadian Archives, Sundries, Upper Canada, 1819. I have not been able to trace Cook further; he does not seem to have belonged to any recognized body of Christians. At the same Assize were tried Henry Pope, an English Wesleyan Methodist minister, and Mr. Eastman, *i.e.*, the Rev. Daniel Ward Eastman, a Presbyterian minister settled in the township of Grimsby, and authorized under the Provincial Statute. The former was found guilty of solemnizing marriage contrary to law. "but not feloniously as charged in the indictment." Upon this the Chief Justice entered no judgment as the verdict was equivalent to an acquittal. This was Henry Pope, an Englishman, who was stationed at Niagara in 1819 by the English Welseyan Conference. Sanderson's "First Century of Methodism in Canada," vol. 1, p. 104: Carroll's "Case and his Contemporaries," vol. 2, s. 170, *et al.* Mr. Eastman was acquitted although as the Chief Justice reports he was proved to have known that the licence had been obtained by fraud under a false name as a spinster by a woman known to him to be the wife of another man. Daniel Ward Eastman was a native of Goshen County, New York; he came to Beaver Dams near St. Catharines in 1801, then became pastor of a Presbyterian church in Stamford; after ordination at East Palmyra, N.Y., 1802, he took up residence in Beaver Dams, where he had a farm of 50 acres; in 1809 he organized the churches at Louth and Clinton, and at the close of the war removed to Barton—in 1819, to Grimsby, where he lived until his death in 1865. He is said to have married nearly 3,000 couples in the course of his ministry. Gregg's "History of the Presbyterian Church in Canada," Toronto, 1885, gives a full account of Mr. Eastman and his labours.

Unless there is a mistake by the Chief Justice in his report, or by the Attorney-General in his letter, the charge was laid "feloniously," whereas if the real offence was performing the ceremony without having due qualification, as Robinson's letter says, it was really a misdemeanour, and the word "feloniously" was improperly inserted. If so the verdict was right and the Chief Justice was right in considering it as an acquittal; for in those days if the offence was not a felony, but was charged as such, there could be no valid conviction. I remember succeeding in a defence at Cobourg before Sir Thomas Galt in just such a case of misdescription.

The Chief Justice points out that juries are very loath to convict of felony in such cases and recommends a relaxation of the law.

tion with the Church in the United States, and the British (or English) Wesleyan in connection with the British Conference. The first Methodist ministers, preachers or teachers ,were from the United States, and it was not till 1816 that the British Conference sent their missionaries into the province, because there was "much prejudice in many of the inhabitants of Upper Canada against American Missionaries."[31]

The British Methodists, as a rule, submitted to the law — they had no right in England in respect of the solemnizing of marriage and generally avoided setting up any claim in the Colony. But the Episcopal Methodists were different; in the United States from which they had come,[32] they had the right to perform the ceremony, and they claimed the same right in Canada. There were many petitions from Methodists to the Legislature, a practice which was wholly legitimate; but some of the Ministers did not stop at petitioning, they in the face of the law ventured to solemnize matrimony between members of their flock. They were men of strong religious feeling, self-sacrificing, devoted to the saving of souls, but although they repudiated the dogma that marriage is a sacrament, they seemed to think that their ecclesiastical position gave them a right against the law of the land; the appalling consequences on the status of the woman and her children do not seem to have occurred to them.

Henry Ryan was a Presiding Elder, *i.e.*, President of the District, from 1810 to 1823, and it is said that he

[31] See letter to Henry Goulburn, Under-Secretary of State for War and the Colonies, dated from Wesleyan Mission House, 77 Hatton Garden, 3 July, 1821, signed by John Burdsall, Jos. Taylor, and Richard Watson, Secretaries, Canadian Archives, Sundries, Upper Canada, 1821. Four of their missionaries were sent in 1816, from Lower Canada, and as many as eight came in by 1821, when the British Conference finding that there was "no evidence of their American brethren interfering in political questions" and that they "generally remained in the Province during the late war," not thinking it well to carry on warfare with their American brethren, withdrew the missionaries except at Kingston—that was different from the remainder of the Provinces as it was "a great naval and military station." See same letter.

[32] Andrew Prindle, born in what is now Prince Edward County, in 1780, ordained 1806, and stationed at Ottawa, is said to have been the first native-born Methodist Episcopal minister in the Province.

brought himself within the law; but was pardoned on account of his well-known loyalty.[33]

The difficulty of obtaining a verdict of guilty on a charge of Felony under the Statute of 26 George II. was pointed out by the Chief Justice in his report of the Niagara Fall Assizes, 1819, and he recommended a relaxation of the law (see Note [30] *ante*); we have seen that in his report of the Eastern Circuit for the Fall of 1820 he expected a change; his expectation was not disappointed. In the Session of 1821, the Legislature passed an Act "for the more certain punishment of persons illegally solemnizing marriage within the Province," which made it a misdemeanour for anyone not legally authorized to marry any persons, and for anyone legally authorized to marry without banns or license — the prosecution to be begun within two years.[34]

[33] He was an Irishman who first appears as a Methodist minister in Upper Canada in 1805, at the Bay of Quinte—from that time until 1810 he was an ordinary member of the Conference, but in 1810 he became Presiding Elder, which position he occupied until 1815, when the Province was divided into two Districts—from that time until he took a mission in 1824, he was presiding elder of one or other District. He subsequently led a portion of his church to form an independent Church, the Canadian Wesleyan Methodist Church (1829), the "Ryanites," which after a few years merged in the Methodist New Connexion (1841) at which time it had 21 preachers and 2,481 members. Webster, p. 237.

A good account of Elder Ryan will be found in Canniff's "History of the Settlement of Upper Canada," Toronto, 1869, pp. 295 sqq. This is a most interesting book, but unfortunately disfigured by errors and inaccuracies in fact and by defective proof reading.

[34] (1821) 2 George IV., c. 13 (U. C.).

Many of the Methodist writers speak of the prosecution—what they call persecution—of their ministers—most of the references are traditional and not wholly to be relied upon, and all that I have seen indicate that they believed the rights of their ministers interfered with. Many wholly baseless assertions are made—the following is a sample taken from Webster's "History of the Methodist Episcopal Church in Canada," Hamilton, 1870:

"Some Methodist ministers at a former period solemnized matrimony, but the Government had refused to acknowledge such marriages legal, and in consequence the authorities had given the ministers who thus officiated, considerable annoyance. Rev. Joseph Sawyer had been obliged to leave the country for a time, in order to escape the vengeance of the bitter enemies of Methodism, though he was a *regularly ordained* minister, and at the time Presiding Elder, simply because he had ventured to solemnize marriage in his district, and that at a time when there was no law in the land passed by the representatives of the people forbidding it. Rev. Henry Ryan was sentenced to banishment to the United States, by an obsequious judge, for a similar offence, but the sentence was not

Presbyterians of the Church of Scotland claimed that their Church was established in Scotland, and their ministers claimed the same rights as to marrying as the clergy of the Church of England; unfortunately for them it was the laws of England and not the laws of Scotland that were introduced into the Province, and their claim was disallowed. They were put in the same category as Lutherans and Calvinists by the legislature in 1798.

Being thus favoured above the Methodists, they were not found to be offenders against the law. There

carried into execution against him in consequence, it is said, of his well known loyalty. The Rev. Isaac B. Smith was prosecuted for marrying a couple on his charge. He protested against the claims of superiority set up by the would-be 'Established Church,' stood his trial, pleaded his own case, and, notwithstanding all the legal advantages of his opponents, the technical skill of adverse lawyers, the exertions of the prosecuting counsel, and the very apparent partiality of the judge, he won the suit, the jury deciding in his favour."

This is very inexact.

1. Methodist ministers never solemnized matrimony in this Province legally until after the Statute of 1830. 2. The Government had not refused to acknowledge these marriages as legal, the Legislature had full control. 3. There was a law of the land passed by the people's representatives in 1800 introducing the English law and forbidding such marriages. 4. "The obsequious judge" did not make the law and had no option but to sentence Ryan to banishment, and 5, the jury which tried Isaac B. Smith were false to their duty.

Sawyer came to the Province in 1800, became Presiding Elder 1806, and remained such until he "located," *i.e.*, went into secular life in 1810. He does not appear in the Conference lists for 1804 or 1805; he may have been absent to allow the three years to elapse during which a prosecution under 26 George II. could be brought. See Sanderson's "First Century of Methodism, &c.," pp. 36, 41, 46, 48, 49, 53, 58, 59.

Isaac B. Smith became Henry Ryan's son-in-law; he came to the Province in 1807, "located" in 1812; returned to clerical service 1817, was superannuated in 1825, and went to the United States in 1820, do., do., pp. 48, 49, 62, 71, 88, 100, 111, 123, 137, 148, 168, 228.

Rev. John Carroll, in the first volume of his "Case and his Contemporaries," p. 148, s. 17, speaking of the Rev. Isaac B. Smith, a Methodist missionary, says: "He was courageous. After his ordination he ventured to marry a couple within the Province boundaries, and was consequently prosecuted by the privileged class, who claimed the exclusive right to celebrate matrimony. Unlike the excellent but timid Sawyer, who for a time fled the country on a similar charge being preferred against him, Smith stood his ground, searched into the law on the subject, pleaded his own cause, and despite the talents and legal lore of the prosecuting attorney, and the Judge's brow-beating, came off scot-clear. In this he was more fortunate than his father-in-law, Mr. Ryan, who, according to report, was banished for a similar offence, though afterwards made a subject of the Government's clemency for his known loyalty."

are, however, a few instances of transgressing on the part of those who were in fact Presbyterian, though not of the Communion of the Church of Scotland.

July 20, 1809, instructions were given by Lieutenant-Governor Francis Gore to the Attorney-General, William Firth, to "institute proceedings against Mr. McDowall, of Earnestown, for solemnizing marriages illegally, and Reuben Beagle of the same place for the same offence." [35]

The Revd. John Langhorne complained to Governor Gore, January 4, 1811, that "Mr. McDowel, the preacher to the Low Dutch, has been again at his old practice marrying unlawfully"; he had performed the ceremony December 11, 1810, between John Philips and Polly Defoe (daughter of Samuel Defoe), both of Fredericksburg, and not of his religion—but nothing seems to have been done about it, though the clergyman closes his letter "God bless the protection of old England as to its clergy and the defender of the Faith, Amen and Amen." "Mr. McDowel" was the "Mr. McDowall" of Ernestown" already mentioned, and a Lutheran, afterwards a Presbyterian.

The Circuits did not form the whole of the duties of his Majesty's Justices; one William Stoutenburgh had been convicted before Mr. Justice Boulton at York in 1818 of petty larceny, and had been sentenced to

[35] Canadian Archives, Sundries, Upper Canada, 1809. Beagle I., cannot trace, but Mr. McDowall was the Rev. Robert McDowall who came to this Province in 1798 from the United States, a minister of the Dutch Reformed Church, and organized churches from Brockville to Toronto. In 1800 he accepted a call to the congregation of Adolphustown, Ernestown, and Fredericksburg on the Bay of Quinte, where he laboured until his death in 1841. He remained of the Classis of Albany until 1818, when he became a member of the Presbytery of Canada, and afterwards joined the Synod of the Church of Scotland, organized in 1831; so that in 1809 he was not technically a Presbyterian. He is said to have married up to 1836 one thousand and one hundred couples; in his record for 1800-1822 he has entries of seven hundred and fifty-two. Burns' "History of the Presbyterian Church," Toronto, 1885, pp. 168, 181.

July 14, 1802, an information *ex officio* was filed against John Wilson, who on June 7, 1801, pretended to solemnize matrimony between Paul Marin, of York, baker, and Jane Butterfield, of the same place, spinster, otherwise called Jane Burke—nothing further seems to have been done on this information and I cannot find what qualification John Wilson had, if any.

two months' imprisonment in the Common Gaol and to receive 25 lashes. He made his escape from the gaol but repented and returned in 1820. He then petitioned that the whipping might be remitted—the Chief Justice reported that whipping was the "most exemplary punishment," and Mr. Justice Boulton did not advise clemency, but rather the reverse, as he thought it " not a good time for clemency." The prisoner renewed his prayer for relief — he produced a certificate [36] from Captain John Button of the First York Militia, that he had joined the Captain's Company of Militia, "Cavalary" in 1815, had "equipt himself with a good hors, saddel and bridel and youniform and cuterments as the law equared, and he always dun his duty faithful when he was cold upon."

Luke and Eliza Stoutenborough—so they spelled the name—his parents, also presented a petition; they said they had brought up fourteen children respectably, that their son's offence was "taking" [37] some tar from a neighbour to repair a canoe he had on the River Humber for fishing, and that they were ready to make a recompense. The mother appealed to Lady Sarah, the wife of Sir Peregrine Maitland. It does not appear what the result was, whether the young man escaped whipping or not — but whatever the course taken by the authorities, Stoutenburgh does not appear to have been turned from evil ways. August 25, 1821, Samuel Ridout, Sheriff of the Home District, wrote to the Governor's Secretary, McMahon, saying that an attempt would probably be made by some persons unknown to release "William Stoghtenborough" then in confinement in the York gaol on a charge of Capital Felony, and asking for a military sentinel at the gaol during the night-time until the Assizes.[38]

[36] Dated at Markham, November 17, 1820; the gallant Captain was an efficient and soldierly officer if he was a bit short on orthography.

[37] " 'Convey' the wise it call "—it is no wonder that the petitioners were indignant at a neighbour prosecuting for such a trivial offence—what we used to call 'hooking' in my boyhood days and would have indignantly resented it being called stealing.

[38] Canadian Archives, Sundries, Upper Canada, 1821. Whipping for petty larceny survived until 1841, 4, 5, Vic. c. 25, 5, 3 (Can.), and was restored in certain cases of crime in 1847, 1y, 12 Vic. c. 49, 5, 9 (Can.).

WHEN THE COURTS OF QUEEN'S BENCH AND CHANCERY STROVE FOR SUPREMACY

BY

WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C., &c., &c.,
Justice of the Supreme Court of Ontario.

Every lawyer is familiar with the historic struggle between the Court of King's Bench and the Court of Chancery, with Coke and Ellesmere as champions, in the time of the British Solomon, the Scots King of England, "James I. and VI."[1] The story is told in Lord Campbell's entertaining Life of Lord Ellesmere;[2] and at this length of time we cannot say how far the result was due to the gruffness of Edward Coke and the suavity and courtliness of Thomas Egerton. The Chancellor, thought to be dying, was triumphant—the Chief Justice, at the acme of his powers, physical and mental, was abased—to take post mortem revenge in the 3rd Book of his Institutes.

Few, however, have heard of what promised to be a similar struggle in Upper Canada.[3]

A Court of Chancery had existed in the old Province of Quebec but the reinstitution of the former French Canadian Civil Law by the Quebec Act of 1774,[4] had practically destroyed its usefulness. When the Province of Upper Canada began its separate Provincial existence (1791-2), no Court of Chancery was formed.

The delivery of the Great Seal of the Province to the Lieutenant-Governor was considered to make him

[1] Of him the amusing story is told that a Chaplain when preaching before the King selected his text: "James first and sixth, 'He that wavereth is like a wave of the sea, driven with the wind and tossed.'" It is no wonder that the King, who, whatever his faults, was generally good natured, should say to the divine, "Faith, mon, ye are no blate."

[2] In the second volume of his "Lives of the Lords Chancellors."

[3] I was put on the track of this interesting episode in our legal history by the perusal of contemporaneous letters written by (Sir) Oliver Mowat, kindly placed at my disposal by his nephew, Herbert Mowat, Esq., K.C., M.P.

[4] (1774), 14 Geo. III. c. 83 (Imp.).

ipso facto Chancellor; and that he had the power to set up a Court of Chancery there was and could be no doubt—but it was not thought wise for him to take advantage in that respect of the powers given him by his Royal Master. There were many schemes framed for such a Court; and Powell, Allcock, Thorpe, Willis, in succession desired to be the head of it, under the Lieutenant-Governor; but for various reasons all these schemes fell through,[5] and it was not till 1837 that the Legislature established a Court of Chancery for the Province of Upper Canada.

The Provincial Act passed March 4th, 1837, 7 Wm. IV., c. 2, "constituted and established a Court of Chancery" with one Judge called "the Vice-Chancellor of Upper Canada" and having very wide equitable jurisdiction.

To the office of Vice-Chancellor of Upper Canada was appointed the Attorney-General, Robert Sympson Jameson, of the Middle Temple, who had been a Judge at Dominica, B.W.I., and had been appointed Attorney-General of Upper Canada in 1833 [6]—he continued to fill the position of Vice-Chancellor after the Court was reorganized in 1849, and retired in 1850 to be succeeded by a much abler man, John Godfrey Spragge, who later became Chancellor and Chief Justice of the Province.

In 1844 the incident took place the subject of this paper.

The Bankruptcy Act of 1843, 7 Vic., c. 10 (Can.), gave the jurisdiction in Bankruptcy to "the Judge or Commissioner"—*i.e.*, "the several Judges of the Dis-

[5] The interesting story of these early attempts to set up a Court of Chancery has not been told—the materials are abundant in the Archives at Ottawa, the Powell Papers, the Simcoe Papers, etc.

[6] He was the husband of the well-known authoress, Mrs. Jameson (Anna Murphy). When he was appointed to the Vice-Chancellorship, the question came up in Convocation of the Law Society of Upper Canada whether he could continue at the head of the Society as Treasurer; it was decided by the Benchers that he was not a "Judge" so as to become a visitor of the Society, and consequently he retained his place as Treasurer. While the Judges of the Court of King's Bench were already "Their Lordships," during all the time Jameson was Vice-Chancellor, 1837-1850, he was "His Honour," following the English custom.

trict Courts in this Province and the several Commissioners appointed under the Ordinance of Lower Canada concerning Bankrupts," with power to the Governor to appoint other Commissioners in case of need. No power was given to or taken away from the Courts of Queen's Bench or Chancery except that they were made "Courts of Review . . . with full . . . authority to entertain, hear and determine . . . appeals . . . from the said Judges and Commissioners. . ." Sec. 68.

The firm of Merritt and Scott carried on business at St. Catharines in rather a large way; John Mittleberger claimed to be a creditor of that firm in a considerable amount and proposed to issue a Commission of Bankruptcy against the firm. Merritt and Scott applied to the Vice-Chancellor on a petition praying that the Commission when issued might be superseded and that in the meantime advertisement in the Gazette might be stayed, and seizure of their property prohibited—whereupon the Vice-Chancellor granted an order staying advertisement and seizure.[7]

Mittleberger's solicitors advised that the Vice-Chancellor had only appellate jurisdiction; and made an application to the Court of Queen's Bench for a writ of prohibition directed to the Vice-Chancellor forbidding him to proceed in the matter as not being within his jurisdiction.[8]

[7] See the report in *Re Merritt et al.* (1844), 1 U. C. Jur., 283.

[8] The following is in the Queen's Bench Term Book:

In Hilary Term, 8 Victoriae, Tuesday, 12th Nov., 1844, before a Court composed of Chief Justice John Beverley Robinson and Puisne Justices Jonas Jones and Christopher Alexander Hagerman.

"In the matter of Merritt & Scott v. Vice-Chancellor } Rule Nisi granted (4 papers) Burns."

Oliver Mowat in a letter to his brother, Mr. John B. Mowat, Kingston, dated Toronto, Nov. 15, 1844, says: "Mr. Burns moved the Court of Queen's Bench the other day for a Writ of Prohibition to restrain the Vice-Chancellor from proceeding to carry into effect an Order in Bankruptcy, which His Honour had made in one of our cases. The motion is to be argued to-morrow, and is creating some excitement in the profession. The general impression has always been that the Court of Chancery and not the Court of Queen's Bench was the Superior Court. And this is the first application ever made founded on a contrary view. The Master and Mr. Turner together have made the old

It will be seen that this was an open attempt to subject the Court of Chancery to the supervision of the Court of Queen's Bench—to make the Court of Chancery an inferior Court, just as Coke had tried to do three centuries before in England. The motion was made before the full Court of Queen's Bench by Mr. Robert Easton Burns, the head of the eminent Chancery firm of Burns, Mowat and VanKoughnet [9]—a Rule Nisi was granted [10]—after the argument of the Rule the Court considered that it was incumbent upon them to grant the writ of prohibition.[11] Thereupon Coun-

Vice very angry and indignant on the subject. I would not wonder to see the two Courts in collision before the affair ends." (The "Master" was John Godfrey Spragge. Mr. Turner was a very prominent chancery practitioner.)

Mowat had not a high opinion of Jameson; in a letter to his brother, John, dated at Toronto, June 12, 1844, he says: "Yesterday's story was that Judge Hagerman was asleep on the Bench for about two hours in the afternoon; nobody seemed to regret the loss which clients were sustaining on this account. Another Court is presided over by a Judge, whom universal scandal declares to be always in a state of mental sleep." Read in his "Lives of the Judges," Toronto, 1888, at p. 195, says: "The Vice-Chancellor . . . was a great stickler for precedents, not given to striking out in new paths or venturing to establish a principle unfortified by past authority. A friend of mine who knew the Vice-Chancellor well says that Mr. Jameson told him that he thought the principal duty of a Judge was to follow precedent."

[9] Burns the same year became Judge of the Home District Court (Toronto), and in 1850 he was raised to the Bench of the Court of Queen's Bench; he died in Toronto in 1863. (Sir) Oliver Mowat became Vice-Chancellor 1864, and remained in that position until he resigned to become Prime Minister of Ontario; Philip M. S. S. Vankoughnet became Chancellor in 1862, and remained such until his early death in 1869.

[10] The practice in those days was to apply to the Court for a "Rule Nisi," *i.e.*, an order or summons to the other side to show cause why the desired order should not be made. The Rule Nisi was served on the opposing party, and upon the day set the matter was argued. The mere granting of a Rule Nisi was considered to indicate that the applicant had made out a *prima facie* and rather more than an arguable case, consequently the opposing party was called upon to open the argument by "shewing cause" why the order should not be made.

[11] The case was argued in Trinity Term, 8 Vic., Saturday, November 16, 1844, before the Chief Justice Robinson and Jones and Hagerman, JJ.

"In re Mittleberger v. Merritt." } Argued by H. J. Boulton and Esten for Defendant; by Burns and Blake for Plaintiff.

Henry John Boulton was at this time no longer a Law Officer of the Crown; he had been Chief Justice of Newfoundland for five years, and had returned to Canada and again entered public life. James C. Palmer Esten was born in Bermuda; he came to Toronto in 1836, and

sel opposing the Rule, Mr. Robert Baldwin Sullivan,[12] who had recently left the Government and resumed his practice of law in Toronto, urged that the creditor should be directed "to declare according to the practice of the Court"—in other words to set out his case in a formal pleading, a "declaration," which could be formally pleaded to and the question regularly tried out.

joined the Bar in 1838; he did not become a solicitor. On the reorganization of the Court of Chancery in 1849, he was appointed a Vice-Chancellor; he survived until 1864.

William Hume Blake, the father of the Honourable Edward and Samuel Hume Blake, was the first professional Chancellor of Upper Canada, 1849; he lived until 1870, but had resigned his office some eight years before; he was appointed a Judge of Appeal in 1864, which office he held until his death. He was an Irishman of good education and great ability; he came to Upper Canada to farm, but soon wearied of the monotony and drudgery of primitive colonial country life and joined the Bar. His judgments are entitled to respect, but from changed circumstances and practice they are now little quoted. It is to him in great measure that we owe the reorganization of the Court of Chancery in 1849. Of course, when he accepted the Chancellorship the inevitable accusation was made that he had provided a lucrative position for himself; nothing can better indicate the changed conditions of life than the fact that the position of a Judge was then considered a financial prize. *Quantum mutatum*!

The decision was announced on the opening day of the succeeding Term.

[12] Robert Baldwin Sullivan, a brilliant, able and well educated Irishman, had come to Upper Canada with his father in 1819, at the instance of his uncle, Dr. William Warren Baldwin, in whose office he afterwards studied law. He practised for a time in Vittoria, but soon his conspicuous talents sent him to the capital where he joined his uncle's firm. He became mayor and later a Member of Parliament and of the Administration. Oliver Mowat in a letter to his brother, Toronto, February 6, 1844, says of him: "He is said to have forsworn politics forever," and adds somewhat cynically, "I am not quite sure but all political men have forsaken him . . . and I learned the other day that the late (Legislative) Council would willingly have got rid of him if they could, able and zealous as he was . . . Of course, nobody fancies he has any political principles." Mowat further says: "Mr. Sullivan has joined the total abstinence Society here. He is said to have made an experiment of three weeks' abstinence before he joined the Society." In those days anyone who did not drink, at least in moderation, was apt to be considered a hypocrite or a weakling. Sullivan was neither, and his becoming a teetotaler was a seven days' wonder. "With his brilliant talents . . . he must . . . succeed . . . I believe he has not got a single suit or a single brief yet, but he is rubbing up his legal knowledge and laying in a stock of equity knowledge so that his leisure is not idleness."

Sullivan was made a Justice of the Court of Queen's Bench in 1848 and transferred to the Common Pleas in 1850; he died in 1853, at the age of 51. While never a Chief Justice himself he was the father-in-law of three Chief Justices, Thomas Moss, Sir Charles Moss and Sir Glenholme Falconbridge.

The Court acceded to this and the petitioning creditor was directed to declare;[13] this he did and he demanded a plea in answer. Notwithstanding the opinion of the Court of Queen's Bench the Vice-Chancellor made an order superseding the Commission of Bankruptcy,[14] and the stage seemed all set for a direct contest between the Courts for supremacy.

Then occurred one of those accidents which are always coming to pass to prevent the determination of "nice points of law"—Mittleberger was found in the course of litigation not to be a creditor of Merritt and Scott. Consequently there was no longer any occasion for pressing the prohibition or any motive for opposing it. The defendant in prohibition, *i.e.*, the firm of Merritt and Scott, applied to the Court of Queen's Bench for an order staying all further proceedings as they were willing to submit to prohibition. Of course the real object of the motion was to avoid the payment of costs since it was obvious that the Court of Queen's Bench must hold for the plaintiff. It is probable that the motion of Sullivan would have succeeded but for the conduct of the alleged debtors in having the Commission of Bankruptcy set aside by the Vice-Chancellor in the face of the expressed opinion of the Court of Queen's Bench. More than a century before in the King's Bench in England, before Chief Justice Sir William Lee and his fellows, a defendant had succeeded in staying all proceedings without costs on expressing his willingness to submit—the Court has said that the direction to declare was in favour of the defendant and he might waive it.[15]

But in this case the defendant had not submitted to prohibition when the direction was given to declare and consequently the Court of Queen's Bench could successfully distinguish the two cases.

[13] Prohibition was one of the small number of actions in which the defendant was at the common law entitled to "make up and enter the issue," as he was considered an actor; the other actions in which the defendant had the like privilege were replevin and *quare impedit*.

[14] See the report in *Re Merritt et al.* (1844), 1 U. Can. Jur. 283.

[15] See the report in Sir John Strange's Reports of *Gegge* v. *Jones* (1740), 2 Str. 1149.

Blake and VanKoughnet contended that the creditor had the right to proceed with the action in prohibition not only for the costs which he would undoubtedly obtain, but also for substantial damages for the expense he had been put to by the proceedings which he claimed were illegal. The Court expressed doubt of the plaintiff being entitled in such an action to substantial damages as only one shilling was given in such actions—but refused to stay the action except on payment of costs of any proceedings taken by the defendant after the opinion of the Court had been given in favour of the prohibition.[16]

Probably the costs were paid, as nothing further appears of the case.

The Common Law Court thus effectually asserted its superiority to the Court of Chancery; but the Court of Chancery never admitted its inferior position.

The matter is now of only antiquarian interest.

[16] The Rule Nisi was obtained by Sullivan in Easter Term, 8 & 9 Vic., Wednesday, June 11, 1845.

"Mittleberger v. Merritt.	Rule N. S. Granted; Sullivan.

On Thursday, June 19, 1845, is the entry:—

"Mittleberger v. Merritt.	6 papers (filed), by Blake."

This indicates that the Rule Nisi was argued upon that day. The report of the arguments and judgment will be found in the *Queen* v. *The Vice-Chancellor of Upper Canada* (1845), 2 U. C. R. 92. The main case of *Mittleberger* v. *Merritt*, in which the liability of Merritt and Scott was considered, is reported in 1 U. C. R. 330.

William Renwick Riddell.

MR. JUSTICE THORPE*

The Leader of the First Opposition in Upper Canada.

By William Renwick Riddell, LL.D., F.R.S. (Can.),
Justice of Supreme Court of Ontario.

The first Lieutenant-Governor of the Province of Upper Canada in his first Speech from the Throne said that the Canada Act of 1791[1] had "established the British Constitution and also the forms which secure and maintain it in this distant country";[2] and in closing the Session he said that the Constitution of the Province was "the very image and transcript of that of Great Britain."[3]

In a general sense, this claim had some foundation —the King, House of Lords and House of Commons had a not very obscure analogue in the Governor, the Legislative Council and the Legislative Assembly, the members of the Legislative Council being appointed for life,[4] and those of the Legislative Assembly being elected for a particular Parliament.

In the Mother Country the "Opposition" was a well known and well established institution;[5] but for

* Mr. Justice Thorpe was called to the Bar of Ireland in 1781.

[1] The Canada or Constitutional Act was (1791), 31 Geo. III, c. 31 (Imp.).

[2] 7 Ontario Archives Report (1910), pp. 1-3.

[3] 6 Ont. Arch. Rep. (1909), pp. 2, 3.

[4] The proposition to give an hereditary seat to Members of the Legislative Council contained in sec. 6 of the Canada Act was never carried out. Simcoe would have been "very happy was there sufficient property and other qualifications in any Members of the Legislative Council to see the provision of the Canada Act in this respect immediately completed by an hereditary seat derived from a Title of Honour being vested in their Families." See letter from Simcoe to the Duke of Portland, dated Navy Hall, 30th October, 1795, Canadian Archives, Q. 282, pt. 1, pp. 6 *sqq*. But he could find no one properly qualified, and Upper Canada, like Lower Canada, escaped the incubus of hereditary legislators.

[5] It seems probable that the practice of the Opposition sitting together on one side of the Speaker arose about 1740; the title "His Majesty's Opposition" originated in a half derisive speecl. of John Cam Hobhouse, afterwards Lord Broughton, April 10th, 1826, in the House of Commons; Canning and Tierney immediately adopted the phrase invented by Hobhouse. See Hansard, 2nd series, Vol. XV., p. 135; Porritt's Unreformed House of Commons (1903), Vol. I, pp. 507 *sqq;* Cooke's History of Parties, Vol. II., p. 276.

some time there was nothing in the way of an organized Opposition in Upper Canada. This was due in great part to the circumstances that the government was personal and the expenses of the Province were paid almost wholly by the Imperial authorities. It is not until government by Cabinet and party comes in that there is any necessity for organized and permanent Oppositions.

For a time the contest was rather between the two Houses; even in the first Session the Houses disagreed about the proper way to raise a fund to pay the salaries of the officers of the Parliament — the lower House proposed to obtain the money by a duty of sixpence a gallon on all spirits and wine passing through the Province, but this measure was thrown out by the Legislative Council on the second reading.[6]

Perhaps a more interesting difference between the Houses was over the question of slavery. Simcoe in the second Session, that of 1793, procured the passing of an Act abolishing slavery except as to those who were slaves in the Province at the time of the passing of the Act.[7] Notwithstanding the fact that the Bill

[6] See the Journal of the House of Assembly for 1792; 6 Ont. Arch. Rep. (1909), pp. 5, 6, 8, 9, 10, 11, 13; the Bill was sent up for concurrence, October 4th, 1792, Journal of the Legislative Council for 1792, 7 Ont. Arch. Rep. (1910), p. 8: the Bill received the three months' hoist, October 8th, 1792. Simcoe in a letter to Henry Dundas (afterwards Lord Melville, then and until 1801, in charge of the Colonies), from Navy Hall, November 4th, 1792, says the Legislative Assembly "having offices to create and salaries to bestow . . . were rather too liberal of their patronage and pledged their credit to the payment of £174 annually to different officers; the Legislative Council made no engagements, but of course their expenses must be equal . . ."; he then tells of the fate of the Bill passed by the Lower House: Can. Arch., Q. 279, pt. 1, pp. 79 *sqq.*

[7] (1793), 33 Geo. III. c. 7 (U.C.); Simcoe had the assistance of Chief Justice Osgoode in the Upper House and of John White, the Attorney-General, in the Lower House ("Solicitor-General Grey" in my article in 33 Can. Law Times (1913), p. 105, is a *lapsus calami* for "Attorney-General White").

Simcoe gives an interesting and amusing account of how this Bill was passed, in a letter to Dundas, dated from York, September 28, 1793: "The greatest resistance was to the Slave Bill—many plausible Arguments of the demand of Labour and the difficulty of obtaining Servants to cultivate Lands were brought forward. Some possessed of negroes knowing that it was very questionable whether any subsisting Law did authorize Slavery and having purchased several taken in War by the Indians, at small prices wished to reject the Bill entirely; others

passed both Houses unanimously,[8] it is quite certain that there was a great body of public opinion in the Province against it.[9]

In the next Parliament, after Simcoe had left the Province, and in 1798, a Bill for permitting immigrants to bring their slaves into Upper Canada passed the Assembly by a vote of 8 to 4; but the Council by an unanimous vote gave it the three months' hoist.[10]

Simcoe as early as 1793 noted that "it does not appear that there is any disposition in either (House) to oppose the measures of Government by system . . . the only debates that have taken place have been upon detached clauses," but, he said, "while no adverse party seems hitherto to have formed itself . . . sooner or later it seems the natural result of all political institutions. If I were to indulge a spirit of conjecture, I should be induced to think it may sooner take place in the Upper than in the Lower House, although many of the Members are pleased to express a strong attachment to Government." [11]

were desirous to supply themselves by allowing the importation for two years, The matter was finally settled by undertaking to secure the property already obtained upon condition that an immediate stop should be put to the importation and that Slavery should be gradually abolished." Can. Arch., Q. 279, pt. 2, pp. 335 *sqq.*

[8] For the particulars, see my paper "The Slave in Upper Canada," 4 Journal of Negro History (October, 1919), p. 380, n. 17; 7 Ont. Arch. Rep. (1910), pp. 25-28, 32, 33; 6 Ont. Arch. Rep. (1909), pp. 33, 35, 36, 38, 41, 42.

[9] For example Mrs. Hannah Jarvis (wife of William Jarvis, Provincial Secretary), writing from Newark (Niagara), September 25th, 1793, to her father the Reverend Samuel Peters, in London, says: "He (i.e., Simcoe) has by a piece of chicanery freed all the Negroes, by which move he has rendered himself unpopular, with those of his suite, particularly the Attorney-General, Member for Kingston, who will never come in again as a representative." Jarvis-Peters-Hamilton Papers, Can. Arch. The prophecy was fulfilled; John White never came in again as a representative.

[10] The Bill was introduced in the House by Christopher Robinson, Member for Lennox and Addington (the father of Chief Justice Sir John Beverley Robinson); the protagonist against the Bill was the young Solicitor-General, Robert Isaac Dey Grey (who was in 1804 drowned in the "Speedy"). See my paper referred to in note 8, *supra*. When irresponsible Second Chambers are to be evaluated, let it be counted for righteousness that this one prevented Upper Canada being a "Slave State."

[11] See Simcoe's very interesting letter to Dundas from York, formerly Toronto, 16th September 1793. Can. Arch., Q. 279, pt. 2, pp. 335, *sqq.* In the same letter, he says: "Mr. Hamilton (the Honourable

In the following year 1794, two of the Legislative Councillors, William Hamilton and Richard Cartwright, opposed the Government measure whereby the former four Courts of Common Pleas were abolished and the Court of King's Bench for the Province was created; Simcoe reported that this was not a general opposition but simply an objection to a particular measure.[12]

The last session of the Parliament of Upper Canada during Simcoe's Governorship was that of 1796; concerning that Session he reports to the Duke of

William Hamilton, one of the Legislative Councillors) "is an avowed Republican in his statements"—then a charge equivalent to "pro-German" at the present time.

[12] Writing from Niagara, U.C., June 14, 1794, to Dundas, he says: "I believe there will be no opposition whatsoever to this necessary and self-evident measure (i.e., the Militia Bill); indeed there is none except on the part of Mr. Cartwright to the General Measures of the Government, and he has given notice that he shall oppose the principle of the Bill brought in by the Chief Justice (Osgoode) for the constitution of the Supreme Court of Judicature." Can. Arch., Q. 280, pt. 1, pp. 146, *sqq*. Two days later in a letter to Dundas, dated from Navy Hall, June 16, 1794, Simcoe says: "Indeed there is an Universal Spirit of Loyalty in the Assembly and no opposition to the General Measures of Government excepting from Mr. Cartwright, who has given notice that he shall oppose the principle of the Bill for establishing the Supreme Court of Justice in the Province, which the Chief Justice has thought it proper to introduce. This opposition, I am rather inclined to believe, springs from the Spirit of Vanity and Sordidness in the man rather than from any disaffection, though from the habit of his Education he is constantly offering sentiments diametrically opposite to the British Constitution." Can. Arch., Q. 280, pt. 1, pp. 174 *sqq*.

Again in a letter to Dundas from Navy Hall, August 2, 1794, Simcoe says: "The introduction of this Bill as it expressly abolished the late Courts of Common Pleas, gave rise to a formal and regular opposition in the Upper House." Can. Arch., Q. 280, pt. 1, pp. 237 *sqq*.

Writing to Dundas from Kingston, U.C., December 23, 1794, he says: "I conceive Mr. Cartwright's opposition to have been principally directed to the establishment of a Court of Justice which deprived him of the seat of Judge, a station of some triffling (sic) emolument, but of greater power and to display his own talents, which are respectable." Can. Arch., Q. 281, pt. 1, pp. 217 *sqq*.

Simcoe's reports were misunderstood by the Home Authorities—he did not intend to charge general opposition to the measures of the Government on Cartwright's part, but we find the Duke of Portland writing to him from Whitehall, September 5, 1794: "The conduct of Mr. Cartwright in demonstrating a general hostility to all measures of Government is very properly commented on in Mr Secretary Dundas' letter to you. . . ." Can. Arch., Q. 280, pt. 1, pp. 162 *sqq*. It was after the receipt of this dispatch that Simcoe wrote that of December 23, 1794, just cited; he afterwards did full justice to Cartwright's patriotism, ability and integrity.

Portland: "There does not appear to have been any disposition in either House to oppose the measures of Government, although Petitions from the Eastern District in terms exceedingly improper and highly unbecoming were laid upon the table of the House of Assembly a few days antecedent to the closure of the Session." [13]

We find no mention of anything like general opposition during the regime of President Peter Russell (1796-1799) or of the Lieutenant-Governor, General Peter Hunter (1799-1805);[14] but the storm broke over President Alexander Grant who succeeded Hunter after his mysterious and sudden death at Quebec, August 21, 1805.

To understand the virulence of the times the state of the Province must be borne in mind. While many of the inhabitants were United Empire Loyalists or their descendants, many were Americans who had immigrated attracted by the lure of land almost if not quite free; most of them were Republicans and had

[13] Simcoe to Portland, York, June 20, 1796, Can. Arch.. Q. 282, pt. 1, pp. 480 *sqq*. Some Presbyterians and others thought that their Clergy should have the same right to solemnize Marriage as the Clergy of the Church of England, a suggestion wholly monstrous and impudent in the mind of Simcoe, whose devotion to his Church was only equalled if at all by his attachment to Britain and to his conception of British Institutions.

[14] Russell's chief quarrel seems to have been with Chief Justice Elmsley over the removal of the Court of King's Bench to York — see my Paper "How the King's Bench came to Toronto," 40 Can. Law Times (April, 1920), pp. 280 *sqq*.

Hunter, about whom our historians have little to say, was hated by some of the officials of his time; the Powell MSS. contain many animadversions on him more marked by vigour than by respect; and Mrs. Hannah Jarvis, already mentioned, wrote thus to her father, the Reverend Samuel Peters, from York, September 28, 1805: "Our trusty and well-beloved Governor is dead, and if His Majesty can find another who can do more mischief I am sure he had better clear the Kingdom . . . as soon as possible. For my part, I think the Ministry must have scraped all the Fishing Towns in Scotland to have met so great a Devil. The wretch, I am told, half an hour before his Death damned everyone around him in his usual manner." Can. Arch., Jarvis-Peters-Hamilton Papers.

Both Hunter and Russell were greedy of gain—while guilty of nothing positively illegal, for Hunter had the assistance of Chief Justice Allcock and Russell had competent advisers, both received large benefits from their official positions, of what is now termed "honest graft"—the name only is modern. Russell, an Irishman, took his share mainly in land: Hunter a Scot, took his in cash.

no affection for Britain. Moreover, there had come to the Province a number of Irishmen more or less closely connected with the United Irishmen Movement; most of these and many of the Americans were openly or secretly disloyal. The well-known and well-abused Act of 1804 must be judged by the dangers it was intended to avert; that it was needed was the unanimous opinion of both Houses of Parliament.[15]

But there was also a well-grounded dissatisfaction with the action of the Government in respect of grants of land; and those who were opposed to everything British exploited this dissatisfaction. From one cause or another there was much underground grumbling, sometimes a verbal outbreak.

After the tragic death by drowning of Angus Macdonell in the "Speedy," October, 1804, William Weekes was elected to succeed him as Member of the Legislative Assembly representing the constituency of Durham, Simcoe and the East Riding of York. He was an Irishman who was strongly suspected of a connection with the United Irishmen, who had come to New York and become a student of the well-known Aaron Burr; afterwards he came to Upper Canada, where he was called to the Bar,[16] and at once acquired a large and lucrative practice.

He took his seat as Member, February 27, 1805;[17]

[15] The Act (1804) 44 Geo. III. c. 1 (U.C.) under which Gourlay was prosecuted and banished in 1819 continues to be called by those who should know better, an "Alien Act"; the fact is now quite established that originally introduced as an "Alien Act" to meet the case of American immigrants, it was changed in its course through Parliament into a broader bill to cover the case of United Irishmen who were British subjects although rebels. The mistake is generally if not always due to taking Gourlay's writings as accurate.

For this Bill see my "Robert (Fleming) Gourlay" Ont. Hist. Society Papers and Records, Vol. XIV. (1916) pp. 41, 42, 61-65.

[16] To an Ontario lawyer it may be of interest to know that Weekes was the first to be admitted as an Attorney (April 10, 1798) as distinguished from "Advocate and Attorney." He also was the first to be called to the Bar (Trinity Term, 1799) by the Law Society of Upper Canada (except those who had already been Barristers or Advocates, and who were entitled to be called)—in other words, he was the first to be called to the Bar or admitted as Attorney on the merits in Upper Canada.

[17] 8 Ont. Arch. Rep. (1911) p. 46; he was introduced by David McGregor Rogers and Ralph Clench. Rogers had already begun to be a thorn in the side of the Administration; Clench was an office holder and a reliable supporter.

and almost immediately he began to make trouble. The House adjourned that day for want of a quorum, but the following day, Weekes gave notice that he would on the morrow "move the House that it be expedient to enter into the consideration of the disquietude which prevails in this Province by reason of the administration of Public Affairs." The next day, Friday, March 1, 1805, Weekes made his motion, seconded by David McGregor Rogers. Such a motion is of course a motion of want of confidence in the Government and it was so understood; the motion obtained only four votes while there were ten in the negative. Of the four, Weekes was one; Rogers, already a malcontent but not disloyal, was another; Benajah Mallory, who proved himself a traitor by joining the enemy in the War of 1812-14, against whom a True Bill for High Treason was found at the Special Court held at Ancaster, May 23, 1814,[18] but who saved his neck by fleeing from the country, was the third; and Ebenezer Washburn, who not long after left his country for his country's good and whose name, No. 51 on the Roll of Barristers, was erased by order of Convocation, was the fourth.

The malcontents, thus baulked, found another way to annoy the Government. A Committee of the whole sat on the motion of Rogers and Weekes "to take into their consideration the contingent account of the two Houses of Parliament": Weekes was made the Chairman of the Committee, and was the main director in its report. No dishonesty could be found in the payments by the Government; but an irregularity was detected as to the payment of £617 13s. 7d.

The simple and unconcealed fact was that from 1803, Hunter had caused to be paid out of the funds under the control of Parliament, certain expenses incidental to the Administration of Justice and Civil Government, without the previous appropriation by Par-

[18] See King's Bench Term Book for Saturday, November 19, 1814, Mich. Term, 55 Geo. III.

liament. For two years this had been done and the accounts submitted to Parliament without complaint; and Grant followed the practice in perfect innocence. There was no suggestion that the money was not applied to the proper purpose; the only impropriety was in failing to obtain a previous vote of Parliament. No doubt, this was a technical default; but under the circumstances, a venial one.

The Committee resolved that the rights of the Commons House of Assembly had been violated and recommended an Address praying that no moneys should be paid without the assent of Parliament and also a return of the £617 13s. 7d. to the Provincial Treasury—the former request was wholly proper, the latter under the circumstances gratuitously offensive. The Address to His Honour was pompous, affected and studiously insulting.[19] "To comment upon this departure from constitutional authority and fiscal establishment must be more than painful to all who appreciate the advantages of our happy constitution . . . but however studious we are to refrain from stricture we cannot suppress the mixed emotion of our relative condition. . . . We lament it as the subjects of a beneficent Sovereign, and we hope that you in your relations to both will more than sympathize in so extraordinary an occurrence. . . ."

Grant, on the advice of the Attorney-General, Thomas Scott, who obtained but neglected the advice of the far shrewder man, Mr. Justice William Dummer Powell, made what Powell justly characterizes as "a weak and wavering" reply, but promised investigation and correction.[20] This reply being given, March 3, the House was prorogued the same day, and nothing further could be done in Parliament for a time. Outside, much clamour was raised over the so-called arbitrary and unconstitutional actions of the Government —Joseph Willcocks was a prominent leader in this

[19] 8 Ont. Arch. Rep. (1911) pp. 101, 102, 107: Can. Arch. Q. 304. p. 15.

[20] 8 Ont. Arch. Rep. (1911) pp. 113, 114; Can. Arch., Q. 304, pp. 22-26.

campaign. Willcocks had been a member of the United Irishmen in Ireland and coming to Upper Canada had been received with favour; recommending himself to Chief Justice Scott he became Sheriff of the Home District. His feeling toward the Mother Country and British connection may be judged from the fact that he joined the invader in the War of 1812 and was killed at Fort Erie, dressed in the uniform of an American Colonel,[21] after having been expelled from the House of Assembly which he disgraced by his treason.[22]

From what has been said above, it might naturally be supposed that Weekes was the "Leader of the Opposition." The fact was otherwise. The "head centre" and director was no less a person than the Honourable Thomas Thorpe, Puisne Justice of His Majesty's Court of King's Bench in Upper Canada. Thorpe was of Irish birth and by some unnamed services had become a protégé of Castlereagh's. Remembering the times one would not be far wrong in a conjecture that the services had some connection with the Union of Great Britain and Ireland, in which measure Castlereagh took such a prominent part. However that may be, it is certain that Castlereagh "looked after" him; and it was through the influence of Castlereagh[23] that Thorpe was appointed Chief Jus-

[21] Dent in his "The Upper Canadian Rebellion," pp. 90-92, says that Willcocks was goaded into treason—*Credat Judaeus Apella.* This Willcocks is not to be confused with William Willcocks who was of quite another character.

[22] Saturday, February 19, 1814. "On motion of Mr. Nichol, seconded by Mr. Mears, Resolved:

"Sufficient evidence having been offered to this House of the traitorous and disloyal desertion of Joseph Willcocks, one of its Members, to the enemy and of his having actually borne arms against His Majesty's Government, that this House, entertaining the utmost abhorrence of his infamous conduct, which has rendered him incapable of sitting or voting in this House, do declare his seat vacant, and that he shall no longer be considered a Member thereof." Journal of the House of Assembly for Upper Canada, 1814, 9 Ont. Arch. Rep. (1912) p. 111.

[23] From 1768 to 1782 there was a Secretary of State for the Colonies; the office was abolished in 1782 by 22 Geo. III. c. 82, and the Colonies were given into the care of the Home Secretary. This continued to March 17, 1801, when they were given over to the Secretary of State for War and the Colonies; June 12, 1854, a Secretary of State was appointed for the Colonies and the portfolios separated. Castlereagh did

tice of the Supreme Court of Prince Edward Island (1802).

During his incumbency of that office the Island was visited by the well-known Earl of Selkirk; this nobleman, a good judge of character and fair-minded except where interests were concerned dear to his heart, gives us the following graphic sketch:—"The Chief Justice dined with him (i.e., Governor Fanning). Mr. Thorpe, a native of the Kingdom [of Ireland] and not deficient in the natural qualification of enhancing his own importance, 'and is hand and glove with all great people, being here only on an occasional retirement for health, &c.' He has, however, ideas and cleeks in his head to hang inferences upon which does not seem to be the case with the Governor." [24]

Fanning and Thorpe could not agree and it was determined to send the latter to another field of labour; he was appointed Puisne Justice of the Court of King's Bench in Upper Canada,[25] and arrived in

not become Secretary of State for War and the Colonies until July 10, 1805; but it is none the less certain that Thorpe owed his appointment to his influence. Thorpe seems to have been somewhat intimate with Edward Cooke, the Under Secretary, 1804-1806, 1807-1809.

[24] From a copy of Selkirk's Diary in the Canadian Archives at Ottawa—the date is Thursday, August 11, 1803.

General Edmund Fanning became Lieutenant-Governor of Prince Edward Island in 1786, after an amusing contest with Captain Walter Patterson. He was a native of the Colony of New York and of Irish ancestry; a graduate of Yale and for a time a Judge in North Carolina; he was a soldier in the Revolutionary War and gave proofs of courage and ability.

His governorship ceased in 1804.

Selkirk writes thus of him and his hospitality: "I accepted the Governor's invitation to stay all night and he pressed me to remain next day, which I thoughtlessly yielded to and thus interfered considerably with business—the bonhomme's politeness is rather burdensome, he is a man of no superabundant head."

Selkirk's rather contemptuous tone may perhaps be explained by the circumstance that Governor Fanning when he found that the ladies of the Island declined to attend his levees because his companion at bed and board, the mother of his children, was not married to him, said, "I shall soon remedy all that," and married her out of hand.

[25] Under-Secretary Edward Cooke writes to General Hunter under date Downing Street, July 3, 1805: "His Majesty has been pleased to appoint Mr. Thorpe, late Chief Justice of Prince Edward Island, to succeed Mr Cochrane as one of the Judges in Upper Canada, and he sailed sometime since for Prince Edward from whence he will proceed to Canada." Can. Arch., Q. 293A, p. 78; Q. 300, p. 241.

Cochrane was the Judge who was drowned in the "Speedy" disaster on his way to Presqu'isle to try an Indian murderer. He had also been

York in September, 1805. He seems to have considered himself an emissary of the Imperial Government and a spy on the Colonial Administration: he certainly tried in every way to "enhance his own importance."

On arriving at York he found that as he had feared Chief Justice Allcock had gone to Lower Canada to succeed Chief Justice Elmsley. He wrote Cooke, October 1, 1805, that there was now "no Governor, no General, no Bishop, no Chief Justice; the council have made a President . . . from a kind of cabal among them . . . the President . . . quite inefficient. . . . I arrived about three weeks since and suffered much from sickness and was at prodigious expense in bringing so large a family such a distance. . . . When anything (occurs) worth informing you about I will write." He gave his final benediction to the good people of Prince Edward Island; "the worst people in the world are at Prince Edward Island. . . . I blessed you for sending me away."[26] Shortly afterwards he wrote Castlereagh urging his claims to succeed Chief Justice Allcock,[27] but without success as Thomas Scott, the Attorney-General, received the appointment. His opinion of affairs in the Province went from bad to worse. January 24, 1806, he writes to Cooke that Hunter ruined the Province with his "few Scotch instruments" (McGill and Scott were

a Chief Justice of Prince Edward Island, 1801-1803, and had had trouble with Fanning; he came to Upper Canada in 1803 and died the following year.

Thorpe appears to have sailed to Newfoundland, as we find him writing to Under-Secretary Cooke from Newfoundland, June 15, 1805, saying that he always considered that he owed his appointment to him (Cooke), telling him of his dangerous passage on the Iris through 500 miles of ice and much fog; he has heard of the death of Chief Justice Elmsley at Quebec, and asks to succeed him, or if Chief Justice Allcock of Upper Canada succeeds Elmsley, that he may succeed Allcock. Can. Arch., Q. 303, p. 109.

[26] Letter (marked "Private") from Thorpe to Cooke, York, Oct. 1, 1805, Can. Arch., Q. 303, pp. 177 *sqq*. Thorpe's Mandamus as "one of the Judges of the Court of King's Bench in Upper Canada" was sent from Quebec, addressed to the Hon. Peter Russell by James Green, August 30, 1805. Can. Arch., Sundries, U.C.

[27] Letter, Thorpe to Lord Castlereagh, York, November 21, 1805. Can. Arch., Q. 303, pp. 206, 207.

meant); that "nothing had been done for the colony, no roads, bad water communication, no Post, no Religion, no Morals, no Education, no Trade, no Agriculture, no Industry attended to," and adds the significant statement, "I have had some public opportunities . . . and in private I will cultivate all that are deserving or that can be made useful by which means I now pledge myself to you that . . . in twelve months or less I will be ready to carry any measure you may desire through the Legislature. All this I state on the supposition that Lord Castlereagh will not . . . place any one over me on the Bench." [28]

It is plain that Thorpe imagined that he was sent to represent the Home Authorities; and he was making a stipulation for the Chief Justiceship. True to his self-imposed task, when the Legislature was called together, February 4, 1806, he kept constantly near the House of Assembly and assumed the direction of the malcontents there. In a word he became the Leader of the Opposition.[29]

Thorpe after the Prorogation, March 4, appealed direct to Castlereagh, bitterly assailing the Government, urging the erection of a Court of Chancery and imploring the Secretary not to sting him to the heart by placing anyone over him.[30]

He identified himself with every factional assault on the Governor and the Government; but neither paid much attention to him.[31]

[28] Letter, Thorpe to Edward Cooke, from York, Upper Canada, 24 January, 1806. Can. Arch., Q. 305, p. 86.

[29] This abundantly appears from contemporary correspondence: Thorpe himself boasts in a postscript to the letter last mentioned, "5th February, 1806. The Houses of Assembly are sitting, and from want of a person to direct, the lower one is quite wild; in a quiet way I have the reins so as to prevent mischief, tho' like Phæthon I seized them precipitately. I shall not burn myself and hope to save others." It will be seen that unlike Phæthon, he did no great harm to others; but like Phæthon he was struck down by higher authority from the seat he had usurped without shadow of cause or of right.

[30] Can. Arch., Q. 305, pp. 90, *sqq.*

[31] See for example his letter to Grant, April 10, 1806. Can. Arch., Sundries, U.C. (1806).

Notwithstanding his notorious attacks on the Government, he did not hesitate to ask favours. E.g., May 31, 1806, he writes to the President that as his term of tenancy of Mr. Elmsley's house will expire on

Francis Gore was sent out as Lieutenant-Governor and arrived at York August 23, 1806, replacing Grant (whom Thorpe characterized as "an enfeebled old ignorant Methodist preacher"). Weekes and many others presented him with a most flattering address offering to forget former occurrences and to look only to the felicity of the future.[32] Thorpe was taking the Western Circuit and hastened to offer his services.[33] Unfortunately for him he had been making violent attacks on the administration in his addresses to the Grand Juries;[34] and on his return to the capital he was

June 8, he asks that the "Toronto" should carry his family to Niagara the following week: Grant gave orders that this should be done; but, June 12, Thorpe again writes that the Commander of the "Toronto" had called on him to know when he would sail—but that Capt. "Vigour" (Vigeroux) his wife, child and servant were on board and that "I feel that it might be considered as greatly incommoding Capt. "Vigers" if you sent a family of thirteen in so small a vessel with him," and suggests the "delicacy" of awaiting the return of the "Toronto" or some arrangement whereby the military should forward him and his family. Can. Arch., Sundries, U.C. (1806). The President made suitable arrangements and Thorpe with his family were transferred to Niagara at the public expense.

[32] Can. Arch., Q. 305, pp. 197, *sqq.* Gore replied that his endeavour would be to administer the Government "with Impartiality and to preserve it from Anarchy and Innovation"—an answer which did not please the extremists.

[33] In a somewhat patronizing manner be it said. Writing from Niagara Road to Gore, October 4, 1806, he said that the Assizes would be finished on Monday, and "I assure you that if you imagine I could render you any service I will proceed to York by the first opportunity. I am entrusted with much public business to lay before your Excellency—however I am satisfied that wisdom will prevent your opinions or the Acts of your Administration from being formed in precipitation. I do not fear injury from delay, therefore rest my attendance on your pleasure." Can. Arch., Sundries, U.C. (1805). Thorpe's characterization of Grant will be found in his letter to Adam Gordon, of July 14, 1806. Can. Arch., Sundries, U.C.

[34] E.g. At the Assizes at Charlotteville for the London District, he had said "the fifteen years disgraceful administration of this Government calls loudly for your interference, and when there was neither talent, education, information or even manner in the Administration, little could be expected and nothing was produced. . ." Col. Joseph Ryerson, a Tory of the Old School, said openly and truly—that "such conduct was more like that of a United Irishman than a Judge." Thereupon Thorpe took *qui tam.* proceedings in Scandalum Magnatum, a practice obsolete for nearly a century in England—the last case there seems to have been in 1710. No such proceeding had ever before and none has since been taken on this Continent. The Court of King's Bench at York decided that when the English Parliament in 1275 and 1378 spoke of "Justices of one Bench or the other," it meant Justices of the Bench in England and had no thought of a King's Bench in the undiscovered Canada. This judgment, sound as it is, has been attacked by rabid partisans. Dent is not

not received with favour by the new Governor. On the contrary Gore reported to the Colonial Secretary his conduct on circuit in strong if truthful terms.[35]

His friend Weekes was killed at Fort Niagara October 10, 1806, in a duel which he had with Thorpe's knowledge and approval forced upon William Dickson;[36] and Thorpe determined to contest the constituency as his successor.

Gore reported to Windham that he was likely to be elected, and elected he was by a large majority over Gough, the Government candidate in December, 1806. He proceeded with Willcocks and Wyatt (the Surveyor-General, who was active against the Government) to build up the Opposition party; he invited men of standing to join him[37] but with little success.

The House met February 2, 1807, and Thorpe was in his place; Gore in his address informed the House that the money which had been paid by Grant without a vote of Parliament he had directed to be replaced; and thus the grievance was removed. It but remained for the House to do the graceful thing; a motion was made to relinquish the sum over which there had been so much trouble. Thorpe made a violent speech against

ashamed to say "His brother Judges, some of whom were members of the Executive Council, and all of whom were subject to strong influences from that quarter, ruled that the proceeding could not be maintained." A meaner, more contemptible insinuation never was made by the most extreme partizan. Dent, "Upper Canadian Rebellion," Vol. 1, p. 97. For the story of this *qui tam.* action see my Article "Scandalum Magnatum in Upper Canada." 4 Journal Criminal Law and Criminology (May, 1913), pp. 12, *sqq.* Thorpe did not fail to ask the Governor to transport him and his family at public expense to York. See his letter to Gore, Niagara, Oct. 7, 1806. Can. Arch., Sundries, U.C. (1806).

[35] Letter, Gore to William Windham (who succeeded Castlereagh as Secretary for War and the Colonies, February 14, 1806, from York, Upper Canada, October 29th, 1806. Can. Arch., Q. 305, pp. 61, *sqq.* Thorpe on his first interview with Gore "found him imperious, self-sufficient and ignorant, impressed with a high notion of the old system, surrounded by the same Scotch Pedlars that had insinuated themselves into favour with General Hunter . . . this shop-keeping aristocracy." Letter, Thorpe to Sir George Shee, Under Secretary, York, December 1, 1806. Can. Arch., Q. 305, p. 189.

[36] For the story of this and other duels of early Upper Canada, see my Article, "The Duel in Early Upper Canada," 35 Can. Law Times (1915), pp. 726, *sqq.*

[37] Even D'Arcy Boulton, the Solicitor-General, was invited by Thorpe to join his party. Can. Arch., Q. 306, pp. 35, *sqq.*

the motion but was unable to make any headway. His factious conduct was too manifest and only Washburn followed him into the lobby on the division, twelve voting for the motion.[38] This put an end for the time to anything like faction; the real grievances indeed continued but the threat and afterwards the reality of war and invasion brought all the loyal of the Province together for some years.

Thorpe continued his pernicious activity outside of the House. Gore complained of him to Windham and his conduct was disapproved of; his letters of complaint to Sir George Shee, the Under-Secretary, and others were sternly rebuked.

Mr. Justice Powell, who had been in England on the way to and from Madrid, where he obtained the release from a Spanish-American prison at Omoa of his son Jeremiah, had there heard that it was intended to suspend Thorpe. With Gore's perfect approbation, Powell before the arrival of Castlereagh's despatch, called on Thorpe and told him what was coming. He also told him that if he would ask Gore for leave of absence before the matter became public, he would receive it and money to convey him to Europe. That he at once refused, said he could not be removed without a hearing before the Privy Council, and claimed

[38] 8 Ont. Arch. Rep. (1911), pp. 122, 174, 175. A petition was presented against Thorpe's election on the ground that he, as a Judge, was disqualified, but this was properly disallowed. 8 Ont. Arch. Rep. (1911), pp. 126, *sqq.*

The reason advanced was that Thorpe was a Judge and that in the English practice, a Judge could not be a Member of the House of Commons; but while it is true that except in the time of the Commonwealth the (Common Law) Judges did not sit in the Lower House, it was because they were at first Members and afterwards attendants on the House of Lords.

In Upper Canada while every Chief Justice and one Puisne Justice (Jonas Jones) were Members (and Speakers) of the Legislative Council, there was but one other Judge who was a Member of the Legislative Assembly. He was Henry Allcock, who afterwards became Chief Justice; he was elected for Durham, Simcoe and E. R. of York in 1800 at the General Election for the Third Parliament. He was unseated as not duly elected and did not offer himself again—he became Chief Justice in 1802. There can I think be little doubt that he was influenced by the Governor not again to enter the Assembly. For the whole question, see two Articles of mine: "Judges in the Parliament of Upper Canada," 3 Minnesota Law Review (February and March, 1919), pp. 180, 244, *sqq.*

that everything he had done was by direction of the Secretary of State. He left the Province without leave of absence and without the knowledge of the Governor, believing firmly that Castlereagh would justify him. In an address to his constituents, written at Niagara just as he was leaving the Province to go to New York on his way to England, he expressed the hope that his return should be as rapid as his departure was unexpected. His hopes were vain; his suspension was made final and he was succeeded in his Judgeship by Campbell; he never again appeared in Canada; and no other Judge has ever offered himself for election to the Lower House of Upper Canada.[39]

The subsequent fate of Thorpe is interesting. I have set it out in the article referred to in note 34 as follows:

Mr. Justice Thorpe, returning to England, was appointed Chief Justice of Sierra Leone; after a residence there for some years he brought from that Colony to London a budget of complaints from the people there. He was cashiered for this, and he passed the rest of his life in obscurity and neglect, dying a poor man. It was not the mere bringing of complaints to London which proved fatal to Thorpe. He made a most vigorous, if not virulent, attack in print against the African Institution and its predecessor the Sierra Leone Company organized for the benefit of free blacks on the west coast of Africa. Neither director nor manager escaped the lash of his pen. Wilberforce was by implication charged with hypocrisy, Zachary Macaulay (father of Lord Macaulay) with making money out of the pretended charity, and all were implored to let the unfortunate blacks alone. Perhaps his worst offence was making public that while a poor black settler, Kisil, could not get his pay for work and labour done long before for the company, Macaulay (then lately Secretary and always director) received fifty guineas for importing ten tons of rice into England from the west coast of Africa; and while £14 5s. 4d.

[39] See the Articles referred to in the last note.

was spent "for clothing African boys at school," £107 12s. 0d. went "for a piece of plate to Mr. Macaulay." Thorpe was unwise enough to expose the seamy side of charitable institutions; and when we consider that H.R.H. the Duke of Gloucester was president; Lords Lansdowne, Selkirk, Grenville, Calthorpe, Gambier, and Teignmouth were vice-presidents; members of parliament like Wilberforce, Babington, Horner, Stephen, Wilbraham, etc., were members of the Institution and that Wilberforce was a bosom friend of Pitt's, we need not wonder at Thorpe's dismissal—Don Quixote had quite as good a chance with the windmills. Nevertheless it must be said that his charges in some respects are very like those made a short time before by Dr. and Mrs. Falconbridge. Thorpe's pamphlet went through at least three editions; my own copy (of the third edition) is dated 1815. Perhaps one moral of this story is that Judges should keep out of politics.[40]

[40] It was Lord Bathurst, Secretary of State for War and the Colonies in Liverpool's "purely Tory" administration of 1812, who gave Thorpe his conge. Gourlay in his "Statistical Account of Upper Canada," Vol. II., pp. 322, *et seq.*, has something to say about Mr. Justice Thorpe. Dent in his U. C. Rebellion, Vol. I., pp. 86-90, gives an account of this "honourable and high-minded man whose only fault was that he was too pure for the times in which he lived and for the people among whom his lot was cast." The author could not have read Thorpe's own letters, copies of which are in the Canadian Archives, printed in the Can. Arch. Reports for 1892. Kingsford, Hist. Can. Vol. VII., p. 524; Vol. VIII., pp. 87-193, is less favourable. There is no doubt as to Thorpe's actions: his motives are differently interpreted—*sub judice lis est.* Those interested in Thorpe's charges about Sierra Leone will find them discussed in the Imperial House of Commons (1815), 29 Hans. Deb. 1005 (1815) 30 Hans. Deb. 612.

It must not be supposed from anything contained in this article that Thorpe was at all disloyal. There is nothing to indicate anything of the kind in his career; the whole trouble seems to have been that he was strongly impressed with the sense of his own importance, and angry whenever he was not listened to with what he considered to be proper deference. Moreover it would be grossly unjust to suggest that all those who had been United Irishmen coming to this Province were disloyal to Britain or British connection; some of the very best of our people were either United Irishmen or the descendants of United Irishmen. But there is no doubt that the disaffection in the early part of the 19th century was in a great measure due to the disaffection of Irishmen towards England. Of course there were very many from both the South and North of Ireland who came into this Province who were not only of high standing but also were absolutely and thoroughly loyal in every way.

One graceful act must be put down to Thorpe's credit. When he went to England and failed on receiving the approval of the Colonial

officers, he laid a charge against Gore for criminal libel—the result of the prosecution appears from the following:

"The King v. Francis Gore, Esq., 1820.

"This was an indictment against Francis Gore, late Lieutenant-Governor of Upper Canada, for publishing a libel affecting the character of Judge Thorpe. On motion of Mr. Scarlett, the defendant was brought up for judgment.

"The evidence of publication was the fact of the defendant, having submitted the libellous pamphlet in question, to the perusal of Mr. Sergeant Firth, then Attorney-General of Upper Canada, for his official consideration. The Solicitor-General said he understood the case was to go before the Master, in consequence of the affidavits, which the defendant agreed to file. These affidavits stated that the defendant, in submitting the pamphlet to Mr. Sergeant Firth, did so solely in order to consult him officially as a public officer touching the matters it contained; that he had no intention of circulating the libel; that he was not the author of it; that he had no intention of injuring the character of the prosecutor; and that he had not in any manner given his sanction or authority to any publication, prejudicial to the reputation of that gentleman.

"Mr. Scarlett, after communicating with his client, announced that the latter was perfectly satisfied with the defendant's declaration, and wished it understood that he had never entertained the slightest personal ill-will towards the defendant.

"The defendant was consequently dismissed."

(Quebec Gazette, 3 April, 1820.)

See my Articles in the Minnesota Law Review, mentioned in note 8, *supra*, for further particulars.

THE SAD TALE OF AN INDIAN WIFE

By William Renwick Riddell, LL.D., F.R.S., Can., Etc.,
Justice of the Supreme Court of Ontario.

When in May, 1814, the Special Court of Oyer and Terminer sat in the White House or Union Hotel at Ancaster in Upper Canada to try those accused of High Treason against King George III. by joining the American invader, about seventy Indictments for High Treason were found by the Grand Jury. Only nineteen of those charged were in custody, and they were duly tried—four were acquitted, eight executed, three died in prison, one escaped and three were eventually allowed to go to the United States.

Many of those accused had gone to the United States before the Court sat; and many had otherwise eluded the Canadian soldiers and officers of the Crown, amongst them Epaphrus Lord Phelps.

Those who had gone to the United States, the country was well rid of; such of them as had no property were not thought of again, but those of them who had property were kept in mind, because by High Treason they forfeited all their property to the Crown. The forfeiture, however, took effect not on indictment, or even on conviction, but on attainder, that is, when judgment was pronounced upon the traitor.[1] This was the law of England, for as Blackstone somewhat sententiously says: "After conviction only . . . there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment, the indictment may be erroneous, which will render his guilt uncertain, and thereupon the . . . conviction may be quashed, he may obtain a pardon or be allowed the benefit of clergy . . . But when judgment is once pronounced both law and fact conspire to prove him completely guilty . . . Upon

[1] This had long been established law, but a decision to that effect is reported in our Courts in comparatively modern times: *Doe dem Gillespie* v. *Wixon*, 1848, 5 O. S. 132.

judgment, therefore, of death and not before, the attainder of a criminal commences or upon such circumstances as are equivalent to judgment of death.'"[2]

Epaphrus Lord Phelps lived in the District of Niagara,[3] and he had a lease for 999 years of one thousand acres of land on the Grand River from the well-known Mohawk Chief, Joseph Brant, and this valuable land was worth seizing for the Crown. But Phelps could not be arrested to be brought to trial and formal attainder was impossible—consequently other proceedings must be taken, that the land might be seized. The criminal law of England introduced in part of what was afterwards Upper Canada by the Royal Proclamation of 1763, confirmed in all the territory by the Quebec Act of 1774, was formally and specifically made the law of the Province by the Act of 1800.[4] That law provided that when an Indictment was found against any person for treason and he was not in custody, a writ of Capias was to be issued by a Judge directing the Sheriff of the County in which the Indictment was found to take the accused and him safely keep to answer the charge; if the Sheriff could catch him he was in practice kept in gaol till the next Assizes; if not a return was made of *non est inventus,* the Indictment was moved by *Certiorari* into the King's Bench and the accused was then "put in the *exigent* in order to his outlawry." The Court of King's Bench issued a "writ of *exigent*" or "*exegi facias*" to the Sheriff commanding him to cause the accused "to be exacted from County Court to County Court until he shall be outlawed according to the law and custom of England if he shall not appear. If he shall appear that then you take him and him safely keep that you may have his body before us at West-

[2] Blackstone Commentaries, Bk. IV., p. 374—of course High Treason was without Benefit of Clergy. Blackstone is speaking of clergyable Felonies, but the same rule applied in non-clergyable Felonies and Treason.

[3] The District of Niagara then contained an immense territory, including the present Counties of Lincoln, Welland and Wentworth.

[4] The Quebec Act is (1774), 14 Geo. III., c. 83 (Imp.): the Provincial Act of 1800 is 40 Geo. III., c. 1 (U.C.).

minster, etc., etc. (In Upper Canada, of course, the body was to be brought to York). Thereupon the Sheriff at five successive County Courts "exacted, proclaimed and required to surrender" the accused; if by the fifth exaction he did not surrender, on a return *quinto exactus*, the Court pronounced judgment of outlawry against him which had the same effect as to forfeiture as attainder.[5]

The County Court in England was a Court incident to the jurisdiction of a Sheriff, and the mere fact of a person being a Sheriff gave him (or her)[6] the right to

[5] In the case of an indictment for any petty misdemeanour or on a penal statute the first process was a writ of *venire facias* ordered by a judge directed to the sheriff to summon the accused to appear; if he did appear the object was served, if not, and the sheriff returned that he had lands in the County, then at the end of four days a *distress infinite* was issued directing the sheriff to distrain the accused by all his lands and chattels to appear; and this writ might issue from time to time until appearance; if the return to the *venire facias* showed that he had no lands by which he might be distrained, or when distrained he did not appear, a *capias* was issued as in cases of Treason. In Treason or Felony there was no process before *capias*—in Treason or Homicide only one *capias* was in practice allowed (except where it was supposed that the accused was in some other County, in which case a *capias* was issued to the sheriff of that County under (1429), 8 Henry VI., c. 10, and (1432), 10 Henry VI., c. 6, as in other "Felonies and Trespasses"). In Felonies other than Homicide, the Statute of (1350) 25 Edward III., c. 14, provided for a second *capias*, but this was found to be impracticable and "the usage is to issue only one in every felony." Blackstone Commentaries, Book IV., p. 314 (1st edit., 1769).

In misdemeanours, etc., while a judge might issue a *capias* at once, to bring about outlawry the strict practice was followed. After the first *capias* was returned *non est inventus*, a second *alias capias* was issued and then a third, or *pluries capias*—on non-appearance and return *non est inventus* to the *pluries*, the proceedings were removed into the King's Bench by *certiorari* and a writ of *exigent* was issued, and after five exactions, outlawry followed.

The number of County Courts at which the indictee was to be exacted seems to have differed at different times. I give the practice at this time which is explained with his usual correctness and clearness by Blackstone l.c. (curiously enough he does not refer to the Statutes of 1429 and 1432).

The forms of the writs may be seen in Corner's Practice of the Crown Side Q.B., London, 1844.

[6] The origin of the office in England is hidden in the depths of antiquity. It may be said, however, that it was established, and the sheriff was a well known officer, when the Common Law of England was in the making. The function of the sheriff in those remote days may be gathered from his allegation itself. The word "sheriff" came from two Saxon words "scir" a shire and "geréfa" (the older form is "giróefa"); a chief magistrate, a "reeve." The exact authority of the

hold a County Court. In this Province there was no statutory provision for County Courts; the four Courts of Common Pleas instituted by Lord Dorchester in 1788 were abolished and a Court of King's Bench formed in 1794;[7] certain District Courts were

geréfa is uncertain; it probably varied at various places and various times.

Before the Conquest in 1066, the "scirgeréfa" was an officer of high rank, who was the representative of the King in his shire, presided at the shire-moot, and was responsible for the due administration of the royal estates and for the execution of the law.

At the Conquest his wings were clipped, but he still continued to have judicial powers exercisable in certain Courts (as in the case in Scotland to this day, where the sheriff depute is the Judge Ordinary constituted by the Crown over a particular division of the County).

As to his appointment in England it would seem that originally in some counties the office was hereditary, like an earldom. Westmoreland remained in that state till 1850, when the hereditary character of its shrievalty was abolished by Statute 13, 14 Vict., c. 30, upon the death of the last Earl of Thanet, by which the title became extinct—the shrievalty being hereditary in this family. The result of a shrievalty being hereditary is shown by the curious incident that the celebrated Anne Clifford, Countess of Pembroke, Dorset and Montgomery, exercised the office in person, and as sheriff sat with the Judges on the Bench at the Assizes of Appleby about 1650 (1 Co. Litt., 326n). In Scotland the hereditary nature of the sheriff's office had come to an end long before 1850, *i.e.* in 1747, by 20 Geo. II., c. 43.

In many other shires, the sheriff was elected by the freeholders: There are corporations in England who elect their sheriffs to this day, *e.g.* London. But in most cases the sheriff is appointed by the Crown for one year only.

What is done is this: In November each year the Lord Chancellor, the Chancellor of the Exchequer, the President of the Privy Council and others of the Privy Council, and the Lord Chief Justice (or some of them) write on a slip of parchment the names of three persons, fit to serve as sheriff. His Majesty pierces the parchment with a gold bodkin at the name of one. This one is "pricked." *i.e.* nominated sheriff for the year.

None of these old time formalities was ever introduced into Canada—from the very beginning of British rule, the Governor was given the power to appoint sheriffs, and that power exists to-day (R. S. O. 1914, c. 16, s. 2). See my address delivered before the Sheriffs' Association at Toronto, March 17th, 1916, printed by order of the Legislative Assembly of Ontario.

[7] The Courts of Common Pleas were erected in consequence of the division of the territory, afterwards Upper Canada, into four Districts, Luneburg, Mecklenburg, Nassau and Hesse, by Lord Dorchester's Proclamation of July 24th, 1788. These four Courts continued (the names of the districts were changed to Eastern, Midland, Home and Western, by the Act (1792), 32 Geo. III., c. 8 (U.C.), until they were abolished and the Court of King's Bench erected by the Act (1794), 34 Geo. III., c. 2 (U.C.). The District Courts were provided by (1794), 34 Geo. III., c. 3 (U.C.); these became County Courts in 1849, by the Act, 12 Vic. c. 78, s. 3 Can.); the Courts of Requests were erected by (1792), 32 Geo. III., c. 6, and became Division Courts in

formed in the same year with inferior jurisdiction,[8] and in 1792 still lower Courts, the Courts of Requests, were provided—all of these had civil jurisdiction and the Court of King's Bench had also criminal jurisdiction. Then each District had its Court of Quarter Sessions of the Peace.

Nevertheless the commission of Sheriff was considered to give to the grantee the right to hold a County Court, or as it was sometimes called, a Legal County Court, for the purposes of writs of *exigent*. No record of the holding of any such Court by the Sheriffs in Upper Canada is extant, and it cannot be said that such Courts ever were in fact held. The fact that the Bailiwick of the Sheriff, *i.e.*, the District, contained in every case more than one County, seems to have rendered the legality of such Courts doubtful. It being known that many traitors had escaped capture, the Legislature provided a means of procuring judgment of outlawry: the Act of 1814, 54 Geo. III., c. 13 (U. C.), "An Act to Supply in certain cases the want of County Courts in this Province" became law, March 14, 1814, which recited that "by law there is incident to the office of Sheriff a Court of exclusive jurisdiction in each County wherein all persons named in the legal Writ of Exigent shall be demanded, but that by reason that in the Province several Counties were contained in each of the Districts constituting the Bailiwick of the Sheriffs the Legal County Court is fallen into disuse to the great impediment of justice." The Act then constituted the several Courts

1841, by the Act, 4, 5 Vic. c. 3 (Can.). The Courts of Quarter Sessions were Common Law Courts instituted by the mere granting a Commission of the Peace in and for any District.

[8] The Districts as they existed in 1814 were as follows:—

1. Eastern, formed 1800, Counties Glengarry, Stormont, Dundas, Prescott and Russell.
2. Johnstown, formed 1800, Counties Grenville, Leeds and Carleton.
3. Midland, formed 1800, Counties Frontenac, Lennox, Addington, Hastings and Prince Edward.
4. Newcastle, formed 1802, Counties Northumberland and Durham.
5. Home, formed 1800, Counties York and Simcoe.
6. Gore (Niagara), formed 1800, Counties Lincoln and Haldimand.
7. London, formed 1800, Counties Norfolk, Oxford and Middlesex.
8. Western, formed 1800, Counties Essex and Kent.

of Quarter Sessions of the Peace, the Courts at which the Sheriffs should demand all persons named in any Writ of *Exigent:* and the Court of King's Bench were authorized on a return of *non est inventus* in an *alias* and *pluries* writ of *Capias* to issue a Writ of *Exigent* and award a Proclamation requiring the Sheriffs to demand the Party named three several times at three successive Courts of Quarter Sessions, and to affix the Proclamation at the door of the Court House each time and upon the third demand the party not appearing, Judgment of Outlawry was to be pronounced by the Coroner and returned by the Sheriff with Writ and Proclamation and the Judgment of Outlawry was thereupon effective.

This Act was apparently drawn under a misapprehension of the Law of England, and under the supposition that in all cases an *alias* and a *pluries* writ of *Capias* was necessary before *exigent.* That we have seen is a mistake (see note 5). In the following year the error was rectified; the Act (1815) 55 Geo. III., c. 2, provided that the *alias* and the *pluries capias* should not be necessary except where required in similar cases by the law of England. The Courts of Quarter Sessions of the Peace were declared to be "in the place of the Sheriff's County Courts in England as far as respects any purpose of outlawry or any proceedings therein." Then the Act provided fully for the practice—*Capias,* return *non est inventus, alias capias,* return *non est inventus, exigent* returnable the first day of the fifth term from that in which it was awarded (the Court has four terms every year), proclamation and demand at three successive Quarter Sessions, return and judgment of outlawry by the Court. This Act was to be in existence till the end of any session of Parliament sitting March 14, 1817; and the Act of 1814 was repealed.

On a day in Michaelmas Term, 55 Geo. III., Saturday, November 19, 1814, the Acting Attorney-General, John Beverley Robinson, moved the Court of King's Bench (Scott, C.J., Powell and Campbell, JJ.), and

obtained an order for a writ of *Certiorari* to the Commissioners who presided over the Special Court of Oyer and Terminer [9] to return the Indictments against "Epaphrus Lord Phelps, late of the County of Haldimand in the District of Niagara, Schoolmaster."[10] The Attorney-General also obtained a Writ of *Certiorari* addressed to the Justices of Oyer and Terminer and General Gaol Delivery for the District of Niagara to return the writs of *capias* against Phelps returned before them at their Court. This was the regular Assizes held at Niagara after the Special Court at Ancaster had risen." [11]

The Indictment and proceedings being returned to the Court of King's Bench, a writ of *exigent* and Proclamation was obtained by D'Arcy Boulton,[12] the Attorney-General, against Phelps on Saturday, January 14, 1815, the first day of Hilary Term 55 Geo. III.[13]

[9] Themselves and their "Associates"—the Associates were mere "dummies" and the Justices did all the work, sitting alternately.

[10] See King's Bench Term Book No. 6, now in the Ontario Archives.

[11] Writs of *certiorari* to the Special Commission and to the Ordinary Assize Judges were also obtained in the cases of: 1—Daniel Phillips, 2—Abraham Harding, 3—Ebenezer Kelly, 4—Asa Bacon (or Baton), 5—Baranabas Gibbs, 6—Simon Maybe, 7—George Peacocke, Senior, 8—John Gibbs, 9—John Dixon, 10—Elisha Green, 11—John Bacon, 12—Henry Dockstader, 13—Jonas Olmestead, 14—Seth Smith, 15—William Sutherland, 16—Martin Feit, 17—Henry Criston, 18—Frederick Ouston, 19—William Stewart, 20—Samuel Green, 21—John Harvey, 22—Elias Long, 23—Guy Richards, 24—John Shoefeldt, 24—William Merritt, 25—William Wallace, 26—Ira Bentley, 27—Joseph Lovitt, 28—Gideon Frisbee, 29—George Cain, 30—Phineas Howell, 31—Abraham Markle, 32—William James, 33—Eleazer Daggett, 34—Oliver Grace, 35—William Biggars, 36—Andrew Westbrook, 37—Samuel Jackson, 38—David Hill, 39—Benajah Mallory, 40—Silas Deane, 41—Josiah Deane, 42—Joseph Willcocks, 43—William Markle, 44—Eliakim Crosby.

George Peacocke, Jr., had been executed July 20th, 1814; Nos. 31 and 42 were members of the House of Assembly and were expelled therefrom—the latter was found killed at Fort Erie in the uniform of an American Colonel.

[12] D'Arcy Boulton, the Solicitor-General, had been taken prisoner by a French Privateer, and was a prisoner in France, when John Macdonell, the Attorney-General, was killed at the Battle of Queenston Heights, October, 1812. John Beverley Robinson, a Law Student, not yet called to the Bar by the Law Society, but called illegally by the Court of King's Bench, was made Acting Attorney-General; when Boulton returned to Canada during the short peace of 1814, he became Attorney-General. Robinson went to England, but was soon made Solicitor-General.

[13] The same order was obtained against all in list in note 11, except Nos. 34 and 35, on the first day of Trinity Term, 55 Geo. III., July 3rd,

He was duly exacted for three successive Courts of Quarter Sessions and on the first day of Easter Term, 1816, the Sheriff made his return, whereupon by virtue of section 9 of the Act of 1815, 55 Geo. III. c. 2 (U. C.) Phelps incurred the same forfeiture and disabilities as in cases of outlawry by the criminal law of England.[14]

This was, however, not the only ground upon which the Crown could claim that the land of Phelps was forfeited. The Legislature in 1814 passed an Act[15] reciting that many persons inhabitants of the United States had claimed to be British subjects and had obtained lands in the Province, but since the declaration of war had withdrawn from their allegiance into the United States; and the Act declared that they should be taken and considered as aliens born and incapable of holding lands in the Province. The Act further provided for an Inquisition by a Commissioner "by the oaths of twelve good and lawful men" as to the persons so offending and their lands as of July 1, 1812. All persons interested were to have a

1815, and Exigent and Proclamation issued "on return of *alias capias non est inventus*"; on the same day, also granted against Nos. 5, 6, 7, 9, 10, 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 44; the reason of this duplication of process does not appear.

On Saturday, April 13th, 1816, Easter Term, 56 Geo. III. (Scott, C.J., Powell and Campbell, JJ.), D'Arcy Boulton, Attorney-General, obtained "Duplicate Writs of Exigent against the undermentioned persons (on Mr. Sheriff's affidavit of the loss of the original writs) :—

1—Danl. Phillips, 2—Wm. James, 3—Ira Bentley, 4—Asa Bacon, 5—Epaphrus Lord Phelps, 6—Joseph Lovett, 7—Ebenezer Kelly, 8—Phineas Howell, 9—Abram Markle, 10—William Merritt, 11—Abram Harding, 12—George Cain, 13—Gideon Frisbee, 14—William Wallace, 15—William Markle. These writs all issued 26th April, 1816.

Another prosecution appears from the following entry in Term Book No. 6.

In Hilary Term, 57 Geo. III., Friday, January 10th, 1817, before Scott, C.J. and Campbell, J.

"The King
vs.
Saml. Thompson } High Treason.

Motion for Writ of Exigent in the above Cause tested of the first day of Hilary Term instant.

Motion of D'Arcy Boulton.
Attorney-General."

Issued 20th January, '17.

[14] See the Return made by Attorney-General Boulton, May 27th, 1817. Canadian Archives, Sundries, U.C., 1817.

[15] (1814), 54 Geo. III., c. 9 (U.C.), passed March 14th, 1814.

year after the finding of the Inquisition, or one year after the conclusion of Peace to traverse the Inquisition; peace was declared after the Treaty of Ghent December, 1814, but the Commissioner to enquire concerning the lands of Phelps and others did not sit until January 28, 1818. The Commissioner presiding was Abraham Nelles; he called a jury of twelve men whose foreman was William Nelles, and they found that Phelps was seized of the unexpired portion of the lease of 999 years from Captain Brant. No claim was made at the time against the right of the Crown; nor was any made under the Act of November 27, 1818,[16] vesting the estate of such "aliens" in Commissioners and giving all interested the right to claim within a limited time before the Commissioners with an appeal to the Court of King's Bench.

But when the Commissioners began to take possession of the land there was trouble at once. The land had been leased by Brant, May 1, 1804, to Phelps for 999 years for providing for his wife Esther, a Mohawk woman, and three children born to them. The wife and children were likely to lose their support; Brant indeed was dead, but the chiefs of the Six Nation Indians were alive to the importance of the matter. An Act was procured from the Legislature, April 14, 1821, giving Esther six months to traverse the Inquisition.[17]

Dr. William Warren Baldwin was retained by the Indians; he was Treasurer of the Law Society and had been in this high position five separate years and was to be such again. Baldwin filed a traverse claiming that the Six Nations were allies and not subjects of King George III., a distinct though feudatory people, that the land given them by Sir Frederick Haldimand October 25, 1784,[18] was theirs to dispose of as they

[16] (1818), 58 Geo. III., c. 12 (U.C.), November 27th, 1818.

[17] (1821), 2 Geo. IV., c. 31 (U.C.), April 14th, 1821.

[18] A so-called Treaty—see Morris' Indian Treaties—whereby, October 25th, 1784, Haldimand, then Governor-General of Canada, at the direction of the Home Government did "authorize and permit the Mohawk Nation and such others of the Six Nation Indians as may wish to settle in that quarter to take possession of and settle upon the banks of the

would, that the lease was in accordance with Mohawk custom, that Phelps had such an estate as he could not forfeit, a trust limited to him providing for Esther Phelps and her children.

The case was argued before the two Puisne Justices, Boulton and Campbell, JJ. (the Chief Justice, Powell being absent) by Baldwin for the Traverser and Henry John Boulton, Solicitor-General, for the Crown in Michaelmas Term, 4 Geo. IV., 1823. The report [19] shows that it was well argued on both sides. The Solicitor-General took the position that the "supposition that the Indians are not subject to the laws of the country is absurd; they are as much so as the French Loyalists who settled here after the French Revolution" (the De Puisaye Settlers). The Court held for the Crown, and the Indian wife was left to the care of her tribe.

river commonly known as the Ouse or Grand River, running into Lake Erie, allotting to them for that purpose six miles deep from each side of the river . . . which they and their posterity are to enjoy for forever."

[19] Taylor's Reports, Court of King's Bench of Upper Canada, p. 47.

THE INFORMATION EX-OFFICIO IN UPPER CANADA

By William Renwick Riddell, LL.D., F.R.S. (Can.),
Justice of the Supreme Court of Ontario.

The three ordinary methods by which one accused of crime was brought before a jury of his countrymen at the Common Law, as it was understood toward the end of the 18th Century in England, were by indictment, by Coroner's inquisition and by information *ex officio* by the Attorney-General. The Criminal Law of England introduced into part of the territory afterwards Upper Canada by the Royal Proclamation of 1763 and into the remainder by the Quebec Act of 1774, 14 George III. c. 83, was specifically adopted by the Province by the Act of 1800, 40 George III. c. 1 (U. C.) —and all three methods of procedure were in full force in the Province. The first is in full vigour, the second [1] disappeared with the coming into force of the Criminal Code of 1892, 56 Vict. c. 29 (Dom.), the third is practically *effete* — and it is the third of which it is proposed to treat in the paper.

The Criminal Information *ex officio* was filed in the office of the Court of King's Bench by the Attorney-General,[2] *proprio motu;* neither Court nor any other body had any power over him, the Information was in his sole discretion — the Information lay for misdemeanours only, not for Treason or Felony.

This method of proceeding was shamefully abused in the Tudor and Stewart times, as were many other

[1] When at the Bar I only once as Counsel for the Crown prosecuted upon a Coroner's Inquisition; and while the practice was perfectly well known and recognized by Court and Counsel, it was almost invariable practice to lay a Bill of Indictment and not rely upon the Inquisition. Possibly the fact that Crown Counsel were paid $6 for drawing an Indictment had something to do with the waning almost to disappearance of prosecution on Inquisition. Section 642 of the Criminal Code, 1892, provides that "No one shall be tried upon any Coroner's Inquisition."

[2] During the vacancy of the office of Attorney-General, the Solicitor-General had the same power: *Rex* v. *Withers*, 4 Burr. 2576; *Wilkes* v. *Rex*, 4 Bro. P. C. 360.

proceedings to the detriment of *personae non gratae;* it was in bad odour during the Hanoverian period, but was occasionally brought into operation chiefly for seditious libels and writings,which it was considered had a tendency to disturb the Government or to disquiet the people.

The practice was to file the Information in the office of the Clerk of the Crown and then obtain an order from the Court or (later) a Judge in Chambers for a *capias* directed to the Sheriff of the Bailiwick in which the offender resided. This writ was delivered to the Sheriff who arrested the accused and brought him before the Court; he then pleaded, and if the plea was not guilty he was sent down to his county for trial before a jury.[3]

The first case in Upper Canada was that of Isaac Swayze.[4]

[3] The Court might, and if asked by the Attorney-General would, try the case "at Bar," a not unusual proceeding in important cases.

[4] Isaac Swayze (Swazey, Swayzie, Swaze, Swazie, Swayzey, etc., all these spellings, and others, are to be found in official documents; he spelled it "Swazey"—in the Proceedings in the Court it is "Swayze") was an American who took the Loyalist side during the Revolution, and was an active and useful soldier. His chief employment gained him the appellation of scout and forager from the Loyal, spy and horse thief from the Rebels. He came to Upper Canada and was very prominent in the Niagara district. He had been returned member of the House of Assembly in the First Parliament of Upper Canada, 1792, for the Third Riding of Lincoln: with Ralfe Clench for the Second, Third and Fourth Ridings of Lincoln in the Third Parliament, 1799. Later he was returned (1804) Member for the Second, Third and Fourth Ridings of Lincoln in the House of Assembly for the Fourth Parliament, and in the Sixth for the Fourth Riding of Lincoln, 1812. He became well known in the Province from an occurrence which made a great sensation at the time and subsequently came up in Parliament. Swazey, who was Inspector of Licences, and therefore Collector of Licence Fees for the District of Niagara, and who was also Collector of Municipal Taxes of his Township, being in his house on Saturday night, January 21, 1806, heard, about 11 p.m., his door broken open, and was at once assaulted and severely injured by the burglar who entered with two companions—they took away three bags of money containing £178.5.8¼ of public money and some of Swazey's own. This was Swazey's story; but it must be said that there was some incredulity displayed both by his neighbours and by certain Members when the matter afterwards came up in Parliament. The Magistrates met, searched all suspicious places and examined suspicious characters without success. In the Parliament, which met the following month, nothing was said concerning the loss; but in the next Session, beginning February, 1807, Swazey petitioned to be relieved from accounting for the public money said to have been stolen from him. The bill passed its second reading, but after the Committee

On the first day of Easter Term, 35 George III., Monday, April 20, 1795, before the Court of King's Bench in Term sitting at the Town of Newark (Niagara-on-the-Lake) in which presided William Dummer Powell and Peter Russell [5] the Attorney-General, John White,[6] moved for a *capias* to bring "Isaac Swayze, Esquire, . . . before the Court the next return

of the Whole had reported recommending that the consideration be postponed until the next ensuing session and the report had been adopted by a vote of 10 to 5. Swazey obtained leave to withdraw his petition, which he did. He petitioned the new Parliament (of which he was not a Member) in 1811 for relief; but leave was refused to bring in a bill for that purpose, and the matter dropped. See Hamilton's letter to the Administrator of the Government (Grant) January 28th, 1806, Can. Arch., Sundries, U. C., 1806; the proceedings in the Parliament of Upper Canada will be found in Eighth Report of the Ontario Archives (1911), pp. 152, 154, 159, 160 (where the Division List appears), 434.

For some account of Swazey, see my article in 33 CANADIAN LAW TIMES (1913), pp. 22, 96, 180—as has been said he had been a noted scout or spy on the Loyalist side during the Revolutionary War, and came to Niagara after its close. He frequently claimed to have taken part in the abduction of Morgan, who had disclosed Masonic secrets; but this was admitted by him to be untrue when proceedings were about to be taken against him.

It was on his farm that the old well-known apple originated, the Swayzie Pomme Gris.

[5] The Court of King's Bench was created by the Judicature Act of 1794, 34 Geo. III., c. 2 (U.C.), coming in force, July 7, 1794 (not July 9 as the earliest extant collection of Statutes of Upper Canada has it); this provided for the Court to be presided over by the Chief Justice of the Province and two Puisne Justices. The Chief Justice of the Province, William Osgoode, left for Lower Canada (where he became Chief Justice) a few days after the coming into force of the Act, but before the Court sat; accordingly while he was for a short time technically a member of the Court, he never sat in it. William Dummer Powell, who had been the First (and only) Judge of the Court of Common Pleas in and for the District of Hesse (from and after the Act of 1792, 32 Geo. III., c. 8, U.C., called the Western District) was made a Puisne Justice July 7, 1794, but there was no other permanent appointment until John Elmsley succeeded Osgoode as Chief Justice in 1796. The first three Terms, Powell sat alone; then on the advice of Powell, it was decided to appoint a Judge *pro tem.* to sit with him, and in January, 1795, Peter Russell, the Receiver-General, was appointed — an old soldier wholly ignorant of law, so much so that he expressed his wonder at the jury being composed of an even number of persons. Sometimes Powell alone and sometimes Powell with Russell sat until Elmsley's arrival. January, 1797, Elmsley was sworn in and he and Russell sat for two Terms and nearly all a third—but Powell came back for Michaelmas Term and Russell did not again make his appearance. (He and Elmsley had fallen out about the removal of the Capital and the Court to York, Toronto. See my article "How the King's Bench came to Toronto," 40 CANADIAN LAW TIMES (April, 1920), pp. 280 *sqq.*)

[6] John White was afterwards, in 1800, killed in a duel by John Small, Clerk of the Executive Council; he was the first Attorney-General of the Province and came in 1792.

day [7] to answer'' an Information filed against him for seditious language [8]—the motion was granted and the writ of *capias* issued under the writ; the Sheriff of the Home District [9] arrested Swayze, and Wednesday, April 22, he appeared and pleaded not guilty to the Information and was ''bound in £100. L. M. and Parshal Terry and Essai Barton,[10] in £50 each, that the above bounden Isaac shall appear on Friday next to answer to the Information filed against him'' — the recognizances were taken in open Court and entered by David Burns, Clerk of the Crown. Friday, April 24, Swayze appeared; it was decided to have a Trial at Bar on the following Friday and a *venire facias* was issued to the Sheriff to call a jury for that day. A similar recognizance was entered into with John Wilson and Samuel Pew as bondsmen.

[7] The Judicature Act of 1794 had made four Terms—
Hilary beginning 3rd Monday in January, ending Saturday ensuing week.
Easter beginning Monday after April 16, ending Saturday ensuing week.
Trinity beginning 3rd Monday in July, ending Saturday ensuing week.
Michaelmas beginning 1st Monday in October, ending Saturday ensuing week.

And the first and last days of every Term and every alternate day from the first, not including Sunday, were made return days, *i.e.*, days upon which writs were to be returned in Court, a practice now wholly obsolete.

[8] The proceedings were for seditious language as we know from other sources, but the official records of the Court of King's Bench do not state the offence. Swayze was, like most and not more than many of his contemporaries, given to drink, and the mildness of the sentence and other circumstances make it practically certain that the offensive language was simply idle and drunken vapouring without any real seditious intent. Swayze cannot fairly be accused of treason, although it may be that one of his bondsmen is not wholly free from such an imputation.

[9] In Dorchester's Proclamation of 1788, the District of Nassau stretched from the Trent River to Long Point on Lake Erie: by the Act of 1782, 32 George III., c. 8, U.C., the name was changed to Home District. At this time and until 1797 the *chef lieu* of the District was the Town of Newark, formerly Nassau, Lenox, Butlersburg, West Niagara, etc., etc., and afterwards, as now, Niagara.

[10] Parshall Terry was a United Empire Loyalist and Member in the House of Assembly in the First Parliament of Upper Canada for Norfolk and the Fourth Riding of Lincoln, but was not afterwards a member. He was a close friend of Swayze's in business and Masonically; he came to York and built mills on the Don. He was accidentally drowned in that river in 1808. See Dr. Scadding's Toronto of Old, pp. 222, 223. He was a witness to the will of the celebrated Colonel Butler, Oct. 2, 1795, still of record at Osgoode Hall.

Friday, May 1, the sheriff returned the *venire,* a jury of twelve were sworn, and a bailiff was sworn to attend them [11] and the Court adjourned till the morrow.

The Court sat Saturday, May 2; the evidence was given. "The jury, by their foreman, Andrew Templeton, found the defendant guilty," and he was bound over in £200 L. M.[12] with William Reid and John Haines bondsmen in £100 each "that the above bound Isaac Swayze, Esquire, shall appear the first day of Trinity Term next to receive judgment." Trinity Term came round. On the first day, Monday, July 20, 1795, Swayze appeared, accompanied by his Attorney, Angus Macdonell — he was allowed until the following Friday "to show cause why he should not receive judgment," and in the meantime entered into a recognizance £200 P. M. (*i.e.* Provincial money) with bondsmen George Forsyth and Joseph Edwards £100 each for his appearance to receive judgment. Friday, July 24, he was sentenced "to pay a fine to the King of £10 P. M., and to be committed until paid and also to enter into a recognizance for his good behaviour for two years, himself in £100 and two sureties in £50 each, and to remain in custody until done." The fine was paid and the recognizance given and Swayze was discharged, to appear in a better known and more important proceeding nearly quarter of a century later.

The next case was in Easter Term, 36 Geo. III., April 22, 1796, when the Attorney-General, White, filed an Information *ex officio* against Raymond and obtained a *capias ad respondendum* returnable on the fifth day of Term. Wednesday, April 27, at noon, the *capias* was returned and Angus Macdonell appeared with his client, the defendant, and on consent

[11] A jury was not in those days allowed to separate after being sworn until they were discharged.

[12] L. M. is lawful money: and when not denominated sterling or other currency, it was Provincial, Quebec, Halifax, or Canadian currency, which at that time was worth 9/10 of sterling, *i.e.*, the pound sterling was $4.44 4/9, still called par, or the old par.

of the Attorney-General the trial was put off until the first day of Michaelmas Term—the defendant was "ruled to plead" on that day and "admitted to common bail with consent of the Attorney-General."[13] The matter seems to have been explained, for there is no record of any trial and on the last day of Michaelmas Term, 37 George III., Saturday, November 12, 1797, he "was discharged on motion of Mr. Macdonell, Attorney for the Defendant."[14]

After the swearing in of Chief Justice John Elmsley, Monday, January 16, 1796, and on the same day the Court fixed Friday next for the trial of one Hind on an Information. Hind did not appear for trial and on Wednesday, April 26, a *distringas*[15] was ordered by the Court, returnable the following Monday. The Court did not sit on that day and nothing further is heard of this case.

Now we come to a practice which deserves attention from a historical point of view. At all times the King's Attorney-General could file an Information *ex officio,* but in former times any person could on application to the King's "Coroner and Attorney," then usually called the Clerk of the Crown, file an information for a misdemeanour; and frequently after much expense and trouble have accrued to the defendants there was found to be no ground for the accusation. Accordingly in 1692, Parliament, by the Act 45 W. & M. c. 18, provided that the Clerk of the Crown should not file such an Information without an order of the Court before he had taken a recognizance in the penalty of £20 from the person promoting the matter to prosecute it with effect.

[13] Common Bail was a solemn farce; two alleged but mythical bondsmen, John Doe and Richard Roe, or John Denn and Richard Fenn, became sureties for the appearance of the defendant.

[14] At this time and until the Law Society's Act of (1797) 37 Geo. III., c. 13 (U.C.), practitioners of law received a licence from the Lieutenant-Governor under authority of the Act of (1794) 34 Geo. III., c. 4 (U.C.), as "Advocates and Attornies."

There is no record of Raymond's offence.

[15] A *distringas* was a writ directing the sheriff to distrain the accused by all his goods and lands so as to compel him to appear and answer an indictment or information: Blackstone's ***Distress infinite.***

Thereafter it was the practice to apply to the Court in such case for a "Rule Nisi," calling upon the accused to show cause why an Information should not be filed against him. Of course the right of the Attorney-General to file his Information for sedition and the like was not interfered with, and if he considered the matter of sufficient public importance he might do so without leave. But if the matter was not of that nature, he would apply for a "Rule Nisi."

On January 20, 1797, before Elmsley, C.J., and Russell, J. (*pro tem.*), a Rule Nisi was obtained for service upon Dorland and Van Alstine. Nothing further was done in this case.[16]

The first day of Easter Term, 37 Geo. III., Monday, April 17, 1797, before the same two Judges, a *capias* was obtained by the Attorney-General against Somers and also against Allen on Informations *ex officio* filed against them. Somers appeared on the first day of Trinity Term, 37 Geo. III., July 17, 1797, pleaded guilty to the Information and was sentenced "to pay a fine of £10 according to the Statute." He had sold medicines and prescribed for the sick without a licence from the Board constituted by the Act of (1745) 35 Geo. III., c. 1.[17]

[16] Philip Dorland was elected as a Member of the House of Assembly in the First Parliament August, 1792, for the County of Prince Edward and Township of Adolphustown; he was a Quaker and could not conscientiously take an oath — an oath was prescribed by the Canada Act of 1791, 31 Geo. III., c. 31—but offered to affirm. This the House could not assent to as the law requiring an oath to be taken was quite clear; the seat was declared vacant and a new writ was ordered. Peter Van Alstine was elected and took his seat at the opening of the House in the Session of 1793, Friday, May 31. I find no record of anything against these gentlemen or any of their name justifying a charge against them: neither the Term Book nor any other source of information open to me furnishes any clue to this proposed Information.

[17] This was the first of the Acts respecting the practice of medicine in Upper Canada. The Lieutenant-Governor appointed a Board to examine all who applied for a licence, and those approved by the Board obtained a licence, paying a fee of £2 — an exception was made of those actually practising at the time of the passing of the Canada Act, 1791, 31 Geo. III., c. 31, and also of surgeons and surgeons' mates of the army and navy or vendors of patented medicines. This Act was superseded in 1806 by 46 Geo. III. c. 2; then came (1815) 55 Geo. III., c. 10. See my Article in the *Canadian Journal of Medicine and Surgery*, Toronto, September, 1911, on "The Medical Profession in Ontario." The prosecutions were probably instigated by the members of the Board.

Allen, who was charged with the same offence and who had given recognizances to appear, failed to make his appearance and after an *alias capias* failed to take him April 28, 1796, his recognizances were estreated. We hear no more of him.

Two Tiffanys of the well-known family of that name, which produced many practitioners of medicine, regular and irregular, had Informations *ex officio* laid against them—one April 24, and 29, the other, O. Tiffany, April 29, 1797. The elder Tiffany seems to have escaped, but the younger pleading guilty, was sentenced "to be fined in £20 to the King and to be confined for one calendar month in His Majesty's Gaol at Newark and to remain in confinement till the fine is paid and afterwards to find security for his good behaviour for three years, himself in £100 and two sureties in £50 each," July 19, 1797; his offence was sedition.[18]

The next case was of quite a different character. On the last day of Trinity Term, 39 Geo. III., Saturday, July 13, 1799, before Chief Justice John Elmsley, and Puisne Justices William Dummer Powell and Henry Allcock, the Attorney-General obtained an order "that William Fitzgerald in His Majesty's Regiment of Queen's Rangers do show cause on the first day of Michaelmas Term next why an Information should not be filed against him for writing two letters dated respectively the 12th and 13th of this instant, July, signed William Fitzgerald and addressed to John White, Esquire. And it is also ordered that he the said William Fitzgerald do immediately enter

[18] The elder Tiffany came from New York State about the time of the Treaty of 1783; it is probable that he was brother of Dr. Oliver Tiffany and the father of Dr. Oliver G. Tiffany who practised for a time with Dr. Oliver Tiffany of Ancaster and then went to Chicago. The younger "O. Tiffany" was Dr. Oliver Tiffany who studied at Philadelphia Medical College and after practising for a time in Albany came to Upper Canada. He settled in Ancaster and lived there until his death in 1835. He was a well-known Radical and a friend, personal and political, of William Lyon Mackenzie. Dr. Oliver G. Tiffany above named was his nephew. See my Article "A Medical Slander Suit in Upper Canada 80 Years Ago" in *The Canada Lancet*, Toronto, January, 1913.

into a recognizance before the Judge of this Court with sufficient sureties in the sum of £1,000, Provincial currency and each of the said sureties in £500 of the same currency, conditioned to keep the peace towards the said John White, Esquire, and all other His Majesty's subjects for the space of twelve months from the date hereof. And it is hereby ordered that the Sheriff of the Home District do serve the said William Fitzgerald with this order."

Fitzgerald had written two threatening letters to White, the Attorney-General; on being served with the order he had the good sense to retain Robert Isaac Dey Gray, the young Solicitor-General. Through him the matter was arranged and on the first day of Michaelmas Term, 40 Geo. III., November 4, 1799, the Rule was discharged.

The last Information filed by White (his tragic death in a duel occurred in January, 1800) was for sedition against one Nadaux, who was fined a shilling —no doubt petty sedition.

Gray was appointed Acting Attorney-General on the death of White, and acted as such until the accession to office of Thomas Scott in 1801.

So far as appears, Gray filed only one Information —and Alexander Perry was compelled to give bail himself in £500 L. M. and John Cameron and William Bond each in £250 "like money, . . . to appear at the next Assizes to be holden in and for the Home District to answer to our Information . . . filed against him" on the same day, *i.e.*, the seventh day of Michaelmas Term, 41 Geo. III., Saturday, November 15, 1800. William Dummer Powell, jr. (son of the Judge) and Simon McNabb, were bound over in a recognizance of £40 L. M., to give evidence against him. This of course means that the accused must stand his trial at the regular Court of Oyer and Terminer and General Gaol Delivery, the Criminal Assizes, at York, which had became the *chef lieu* of the Home District in place of Newark in 1797. Perry must have been acquitted as there is no entry of his

appearance for sentence—his alleged offence was probably sedition.

After the assumption of office as Attorney-General by Thomas Scott, 1801, and on the third day of Easter Term, 42 Geo. III., Friday, April 9, 1802, Angus Macdonell as Counsel for John Lyon, applied to the Court (Elmsley, C.J., and Allcock, J.), and obtained against John Wilson a "Rule to show cause on Monday next . . . why an Information for misdemeanour should not be filed against the said John Wilson for having solemnized or pretended to solemnize a marriage on the seventh day of June now last past between Paul Marin, of York, Baker, and Jane Butterfield, of the same place, Spinster, otherwise called Jane Burke, in contempt of the law contrary to the Statute in such case made and provided and in profanation of religion."[19] After a postponement on Monday, April 12, the Rule was enlarged on Thursday of the same week until the first day of Trinity Term, July 5, 1802. It was again postponed on July 5 and 7, and on July 14 made absolute. Wilson must have been sent for trial to the ordinary Criminal Assizes and acquitted, as no further entry appears concerning him.

Thomas Scott still being Attorney-General, on the seventh day of Hilary Term 43 Geo. III., Saturday, January 15, 1803, Angus Macdonell moved before a Court composed of Chief Justice Henry Allcock and

[19] The marriage laws of the Province were a source of trouble for decades, owing largely to the claim of the Church of England to be the Established Church of the Province—the first Marriage Act was in 1793, 33 Geo. III., c. 5, U.C., which validated certain previous irregular marriages (the Hon. Richard Cartwright's among them), and enabled Justices of the Peace to perform the ceremony until there should be five clergymen of the Church of England in the District. The next Act was (1798) 38 Geo. III., c. 4, U.C. (really passed in 1797, but reserved for the Royal pleasure and assented to 1798) which enabled ministers of the Church of Scotland, Lutherans and Calvinists to celebrate the ceremony for members of their own congregations only on obtaining a certificate from the Court of Quarter Sessions. The other denominations were very greatly dissatisfied and some of their ministers insisted on celebrating the ceremony—the Methodists were perhaps the chief offenders, but I do not find John Wilson's name on the roll of their ministers at that time. Marin we shall meet again (see note *post*); he appears several times as a litigant—the name was really Marian, but was spelled in several ways. A paper on the Marriage Laws will appear in the series.

Puisne Justice William Dummer Powell, and obtained a Rule "That Samuel Rierse,[20] Esquire, John Backhouse, Esquire, and Thomas Horner, Esquire, all of the District of London, do shew cause by the first day of next Term why an Information should not be filed against them for a misdemeanour in reviling, threatening, maltreating and wrongfully charging with the crime of perjury one Finlay Malcolm of the District of London, yeoman, and that the said persons do file an affidavit upon which they may shew cause at least twenty days before the first day of next Term," April 13, 1803; this Rule was ordered for the 15th, on which day the accused filed such affidavits as convinced the Court that no Information should be filed, and the "Rule was discharged without costs," which indicated that there was at least some ground for the charge against these persons.

On the fourth day of Hilary Term, 43 Geo. III., Monday, January 10, 1803, William Weeks [21] obtained a Rule against John Wilson, William Graham and Andrew Spring to shew cause "why an Information should not be filed against them for the illegality of their proceedings in the cause of *Shell* v. *Ausman*"; this Rule after two enlargements and an order that the affidavits of Andrew Spring, Henry Shell and Henry Ausman be handed over to the Attorney-General, was discharged July 4, 1803—it is impossible to discover the illegality complained of—probably a conspiracy to suppress or manufacture evidence.

[20] Samuel "Rierse" was Samuel Ryerse, a United Empire Loyalist whose real name was Ryerson, but as the name being spelled "Ryerse" in a patent from the Crown he adopted that as his name. John Backhouse, a prominent resident. Thomas Horner, the first settler of Oxford County (1793), and a leading Methodist. See Webster's "History of the M. E. Church in Canada," Hamilton, 1870, p. 72. Only members of Parliament, Justices of the Peace and the like were called "Esquire" in these formal days.

[21] William Weekes was an Irishman who came to New York and became a pupil of Aaron Burr's; then he came to Upper Canada and was called to the Bar, the first to be called except those who had been practitioners before the Act of 1797. He became a turbulent agitator, joining himself to Joseph Willcocks, a "United Irishman," Mr. Justice Thorpe and others of the same kind. He was killed in a duel by William Dickson, another member of the Bar, at Fort Niagara, October 10, 1806. His name was often spelled "Weeks."

The next case was also one of Mr. Weeks'—in Easter Term, 45 Geo. III., Monday, April 8, 1805, he obtained a Rule from the Court, Mr. Justice Powell sitting alone, for Magistrates of the Home District, William Jarvis, William Willcocks, James McCauley, William Allen and Duncan Cameron, to shew cause "why an Information should not be filed against them for a misdemeanour in refusing a certificate to Paul Marian for obtaining a licence to keep a tavern for the present year from corrupt motives stated in this affidavit of the said Paul Marian."[22] The Attorney-General intervened and after one enlargement at his instance, the Rule was, April 13, discharged with costs.[23]

Scott became Chief Justice in 1806, and in November of 1807 he was succeeded as Attorney-General by William Firth, November 3, 1807, and at once Firth became mixed up with the extraordinary agitation carried on by the malcontents, Mr. Justice Thorpe, Joseph Willcocks and others.[24] Willcocks was sheriff of the Home District, but was dismissed by Lieutenant-Governor; he started a paper, *The Upper Canada Guardian or Freeman's Journal,* in which he attacked

[22] David Burns, Clerk of the Crown, notes "Rule taken out in the evening."

[23] The proceeding must have been wholly without the knowledge or concurrence of the Attorney-General. Paul Marian was a Frenchman, a baker, who had a public oven at the rear of the site of Jordan's York Hotel on King Street, York. The defendants were all men of importance in those days. The Licence Acts in force ((1794) 34 Geo. III., c. 12, U.C., and (1796) 36 Geo. III., c. 3, U.C., had been amended in 1805 to make the licences to be granted from April 5, 1805, run only until January 5, 1806 (1805) 45 Geo. III., c. 1; but a licence to sell liquor was still valuable. The Act of 1796 prescribed the method of obtaining a licence; the applicant applied to the magistrates of the district in General Quarter Sessions assembled, and if it should be deemed by them expedient to increase the number of taverns and that the applicant was a sober and honest man, a certificate was issued to him, which, being produced by him to the Provincial Secretary, authorized the issue of a licence. The defendants were magistrates and had not seen fit to approve of Marian's application.

[24] This is not the place to discuss this agitation; it has been represented as patriotic and also as unreasonable and factious opposition by a disloyal and seditious clique. Those interested will find much original matter in the Report for 1892 of the Canadian Archives. See also my article "Mr. Justice Thorpe: The Leader of the First Opposition in Upper Canada," 40 CANADIAN LAW TIMES (November, 1920), pp, 907, *sqq.*

the administration in most opprobrious and vituperative language. Firth filed an Information *ex officio*, and in Michaelmas Term, 48 Geo. III., Saturday, November 14, 1807, he obtained a bench warrant for Willcocks to appear before a Judge to give security to appear, plead and go to trial. In Hilary Term, Monday, January 4, 1808, Willcocks appeared before the Full Court in Term and pleaded "not guilty." Notice of trial was given him for the next sittings to be held at York. On February 16, 1808, leave was given the Attorney-General to strike a special jury,[25] and on the same day the defendant in person obtained, with the consent of the Attorney-General, a change of venue to the District of Niagara.[26] It was not considered necessary to proceed with this prosecution: the House of Assembly took cognizance of the matter. Willcocks complained that the Attorney-General had already filed an Information against him and that it would be the height of cruelty and injustice to carry on two prosecutions for the same publication. Shortly after this Willcocks (jocularly as he asserts) boasted that the Government party was afraid to bring on the prosecution — and thereupon the House proceeded and convicted him—and sent him to the York gaol.[27]

In Michaelmas Term, 49 Geo. III., November 9, 1808, Benjamin Richardson, who had been convicted on an Information at Newcastle (District) was fined £20, and was committed until the fine should be paid, "and he was delivered to the Deputy Sheriff, Thos. Hamilton, then in Court."

Peter Latouche Chambers was charged with a libel by Elizabeth Montague Smyth, Catharine Murney and Rosamond Smyth, and the Attorney-General, November 16, 1808, obtained a Rule to shew cause; January

[25] It may be said generally, but with many exceptions, that the "better class," the propertied class from which a special jury would be drawn, were more favourable to the Government and a conviction was more likely with a special than with a common jury.

[26] Willcocks would prefer to avoid a special jury at the capital, and would stand a better chance in the Niagara District.

[27] See Willcocks' letter to his constituents in Gourlay's Statistical Account of Upper Canada, Vol. II., pp. 656-662, note.

2, 1809, the Attorney-General obtained leave to withdraw the name of Elizabeth Montague Smyth, and the Solicitor-General moved to make the Rule absolute, but this was refused on the ground that a copy of the original libel did not accompany the affidavit and Rule when it was served. Practice was strict in those days. The matter was twice enlarged and then the defendant appeared, pleaded not guilty and took notice of trial for the Assizes of York; he seems to have been acquitted, or the matter allowed to drop.

No Informations *ex officio* appear during the term of office of John Macdonell, 1811, 1812, the acting term of John Beverley Robinson, 1812-1814, or of D'Arcy Boulton, 1814-1818.

We now come to the most celebrated case of such a proceeding.

Robert Gourlay (who later adopted a middle name Fleming) came to the Province of Upper Canada in 1816 without any intention of stirring up political strife. What seemed to him foolish and tyrannical interference with the advancement of the Province from an economical point of view caused him to publish addresses to the land-owners of the Province. One the well-known "Gagg'd—Gagg'd by Jingo" address, published in the *Niagara Spectator,* December 3, 1817, had the result that Isaac Swayze, already mentioned, laid an Information against the editor, Bartimus Ferguson, for a false, malicious and seditious libel. Ferguson was imprisoned, but the matter was dropped and Ferguson released—he says that he was assured that if he kept the manuscript of such addresses he would not be personally molested. But worse was to come. Gourlay published another address commenting upon the conduct of Sir Peregrine Maitland and the Lieutenant-Governor and the Houses of Parliament in which he made a fierce attack in virulent language; he spoke of the Representatives having "insulted common sense, abused discretion and offended against the clearest law of justice and religion" like "wilful, pettish children," "some dozen

fools and sycophants." The Legislative Council's reply to the Speech from the Throne "is a rider on the treachery of the Commons . . . in conscious deceit and trepidation." The Lieutenant-Governor, "Poor Peregrine . . . the accommodating faith of Sir Peregrine will wax pale," etc., etc., etc., The *Niagara Spectator* published the Address June 28, 1819, it is said in the absence of the editor.

July 5, the Assembly voted this "a scandalous, malicious and traitorous libel," and asked His Excellency "to direct the author, printers and publishers . . . to be publicly prosecuted for the said offence by His Majesty's Attorney-General," and John Beverley Robinson was instructed to file and did file an Information *ex officio* against Ferguson—Gourlay was safe in Niagara gaol and was certain to be banished as soon as the Assizes sat. Ferguson was arrested, July 13, at his house at Niagara and brought to York by Sheriff Merritt across the lake; brought before the Full Court, he pleaded not guilty. After being kept for some days in York gaol, he was taken back by land to Niagara by the sheriff to tried there; he there obtained bail and was released until the Assizes at Niagara. Wisely declining the offer of Gourlay to defend him, Ferguson retained Thomas Taylor (who was afterwards to be our first Law Reporter), and when the Chief Justice Powell held the Court he was found guilty and threw himself on the mercy of the Court—the Chief Justice made an order that he was "to be brought up first day of next Term for judgment in Court of King's Bench." [28]

On the first day of Michaelmas Term, Friday, November 5, 1819,[29] "Mr. Taylor moved to read affidavits in favour of the prisoner, which were read—and his counsel Mr. Taylor heard — the Attorney-General

[28] The Chief Justice's Report of the Assizes is still extant. Can. Archives, Sundries, U.C., 1819.

[29] This is the first entry of the matter in the King's Bench Term Book; the previous proceedings are known from other sources. See my "Robert (Fleming) Gourlay," Ontario Historical Society's Papers and Records, Vol. XIV., pp. 39, 50 and notes.

answered—the Information read—the prisoner ordered to be brought up on Monday next to receive the sentence of the Court." On Monday, November 8, 1819, "the sentence of the Court is that you Bartimus Ferguson do pay a fine of fifty pounds, Province Currency. That you be imprisoned in the common gaol of Niagara for the space of eighteen calendar months, to be computed from this date. That in course of the first of those months you do stand in the Public Pillory [30] one hour between the hours of ten o'clock in the forenoon and two o'clock in the afternoon; and that at the expiration of the said imprisonment you give security for your good behaviour for the term of seven years, yourself in the sum of five hundred pounds and two sureties two hundred and fifty pounds each; and that you further remain in gaol until the said fine be paid and security given."

With this atrocious sentence, of which Chief Justice Powell and his Puisnes, Campbell and Boulton have no reason to be proud, terminates the story in Upper Canada of the Information *ex officio*.[31]

[30] The pillory was abolished in this Province in 1841 by the Act 4-5 Vic., c. 24, s. 31 (Can.).

[31] It is satisfactory to know that on a most humble submission made by the prisoner a great part of his punishment was remitted; he did not again sin in the way of speaking ill of the authorities.

It is possible that some later Informations were filed, but I have not discovered any. I omit all reference to Informations for smuggling (which were often rather *ad rem* than *in personam*)—very many of these are to be found in the Term Books; and see *Rex* v. *Abner Ives*, Draper's Reports, 453; *Reg.* v. *Mainwaring*, 5 U.C.Q.B., O.S., 670—nor do I say anything of informations for land, etc., such as *Mewburn* v. *Street*, 21 U.C.R. 306; or for penalties, *Reg.* v. *Taylor*, 36 U.C.R. 183; 1 S.C.R. 35, or in Equity.

William Renwick Riddell.

WILLIAM OSGOODE—FIRST CHIEF JUSTICE OF UPPER CANADA—1792-1794

By William Renwick Riddell, LL.D., F.R.S. (Can.)
Justice of Supreme Court of Ontario.

William Osgoode [1] was born in London in 1754, the son of William Osgood of St. Martin's Parish, Gentleman.[2]

He was educated at Christ Church, Oxford, matriculating in 1768, graduating B.A., 1772, M.A. 1777.[3] There is no record of his early training: he became an accurate classical scholar both in Greek and in Latin and his style in English is clear and concise.

[1] The account given by the late David Read, Q.C., of Osgoode, in his well-known "Lives of the Judges," Toronto, 1888, is creditable in the circumstances and conditions under which Mr. Read worked and in view of the information at his disposal. But he could not utilize the valuable records now in the Canadian Archives at Ottawa, the Diary of Mrs. Simcoe, wife of the first Lieutenant-Governor, and the Wolford Manor (Simcoe) Papers obtained by the late John Ross Robertson, the Powell MSS., the Diary of John White now in the possession of Mrs. Egerton, Toronto, but still unpublished, the Jarvis-Peters Papers, or the extraordinarily interesting letters to and from Osgoode now become the property of the Law Society of Upper Canada through the generosity of Mr. H. S. Osler, K.C. I have not followed Mr. Read at all, but have gone to the original sources for information.

[2] The most grotesque stories were afterwards circulated at Quebec of his origin; one of them which is embalmed in the pages of Garneau's History of Canada is that he was the illegitimate son of George III., Bell's Translation of Garneau, 2nd ed., Montreal, 1862, vol. II., p. 232. As George III. was himself born in 1738 and from the death of his father in 1751, was kept in seclusion by his mother and Lord Bute, we may dismiss the story as absurd.

His name, for a long time, was spelled by himself and his most intimate friends, Joseph Jekyll and Meyer Schomberg, "Osgood"—the first appearance of the final "e" being in a letter from Jekyll, September 7, 1781. See *post*, note 69.

[3] Of his M.A. degree he says in a letter to his friend, Meyer Schomberg, "I stayed (at a cottage near High Wycombe) five weeks with a view of reading and skimming a few sciences for my Degree; but with my usual perseverance I did not look in a book till the day preceding my examination and on that day I studied Metaphysics, Physics, Optics, Astronomy, in short nine sciences together with the Hebrew language. The Vice-Chancellor and Proctor honoured me with their presence the whole time and Bobby Nares (the well-known philologist) who was examined for his Batchelor's Degree; and I made a very respectable figure, and next term I write M.A. after my name." Osgoode MSS.

In the University he was an intimate friend of the celebrated wit Joseph Jekyll [4] with whom he carried on an animated and frequent correspondence until his own death, and of Meyer Schomberg [5] a briliant scholar but somewhat reckless in financial matters; with him Osgoode corresponded till Schomberg died in 1780.

In 1773 he entered himself in Lincoln's Inn a student-at-law and pursued his duties with care and diligence. While he had considerable knowledge of French [6] and Jekyll had perhaps more, they determined to visit France to acquire the language more

[4] Joseph Jekyll was the most celebrated wit of his time—a strong Whig, he contributed Pasquinades to the "Morning Chronicle," etc. He was a barrister and had a very large counsel practice; his letters to Osgoode show that he was, perhaps, the most sought counsel on his circuit.

Among the Osgoode MSS. are eighty-three letters from Jekyll to Osgoode from January, 1772, when Osgoode was at Christ Church till November, 1823, when Osgoode was suffering from the fatal disorder which carried him off in the following January. These letters are of the most interesting and amusing character; they show that he and Osgoode were very intimate—the confessions made in writing are of the most private kind and of facts which most men would keep secret from all. The language is often Rabelaisian but bears out Jekyll's reputation as a wit. Few of his witticisms can be printed even in the decent obscurity of a learned or a foreign language—he makes jokes in Latin and in French as well as in English. In English he is wont to use the coarse and vulgar monosyllable to describe certain part of the body and certain physiological acts; in French the only jest I care to transfer to this note is that of the French farmer who over his dairy placed the sign [I] for "La Laiterie" (la lettre I)—and over his stable "Honi soit qui mal y panse," Letter. October 18, 1784. His Latin pun "Judaei fractifalli" for Jew brokers ("broke" "errs") is as bad and consequently as good as most Latin puns in English. Letter, January 30, 1772. I do not transcribe his jokes in English.

[5] Son of Dr. Ralph Schomberg, of Yarmouth, Norfolk; the son matriculated into University College in 1769, but does not seem to have taken a degree. His correspondence with Osgoode was also of an intimate character, but he had neither the wit nor the coarseness of Jekyll. He got into debt and at length obtained a commission in some degree through Osgoode's influence in a regiment being raised for the Western Hemisphere; he died on this continent in 1780. In the Osgoode MSS. are thirty-six letters from him, and thirteen from Osgoode to him. He always calls Osgoode "Nim" or "Nym" (as Jekyll does occasionally) apparently for "Nimrod," on account of Osgoode's fondness for hunting—although Nym, Falstaff's friend, is sometimes squinted at.

[6] In a letter to Schomberg at Bath, in September, 1773, Osgoode says: "I have read Horace and Aristotle's Poetics carefully with Hurd's Notes on the one and D'Acier on the other—Vida's Boileau with a French translation of Longinus, which happened to be bound with his Satires which by the bye are most excellent, more nerve and point than I imagined the French language was able to express."

perfectly. This they did together in April, 1775, passing through Brighthelmstone (now Brighton) to Dieppe, and thence by Rouen to Paris—there they stayed only a week for they found too many English and were not improving their French.[7] Accordingly they made their residence at Orleans "chez Mons. Risso, Place de Martroy."[8] There the two spent a month—"misspent" Jekyll calls it,[9] too many English speaking people rendered it impossible to learn French thoroughly at that place; and Jekyll went to Blois where he did "not articulate 10 words of English."[10] Osgoode went to Lyons and Auxerre[11] then through Paris and to England early in 1776. He again took up his residence at Lincoln's Inn and continued his

[7] The patriotic Osgoode says "London has it hollow, my friend." Letter to Schomberg from Orleans, April 4, 1775.

[8] See letter mentioned in note 7.

[9] See Jekyll's letters May 12, 1775, sqq.; Osgoode's to Schomberg April 14, 1775, sqq.

[10] Jekyll says, July 31, 1775, "You never had the same reason for I now speak the jargon I call French fluently enough to chatter (as in English) upon all subjects . . . you spoke French well for an Englishman—for the Graces."

[11] We find a letter of introduction by John Ellison at Paris, July 19, 1775, to Monsieur J. Black, Bordeaux, introducing "Mr. Osgood, an English gentleman, a right honest good fellow and a very particular friend of mine; he'll pass a few days with you at Bordeaux," Osgoode MSS. But Osgoode does not seem to have used it. His last letter from France to Schomberg is dated from Paris, January 29, 1776; he desires Schomberg who had Chambers at Lincoln's Inn, to "order my old woman that she have my Chambers ready by the latter end of next week." In this letter he unconsciously displays much of his own character. "I got a place this morning in Sir David Carnegie's Loge and shall again indulge in seeing the best dancers in Europe. The people say that the Church is the spouse of the Almighty, but like many other wives, the Catholic spouse disobeys the commands of her husband: in the fourth instance, the Protestant rib is a more dutiful dowdy, more attentive and more affectionate and will not keep her Rout on a Sunday. This is the day throughout the Catholic country whereon any honest man shows his trick to the greatest advantage. The Holy Mother dispenses with two of the marriage articles in the coolest manner possible, having been copied by different conveyancers, and technical terms varying other words have been adopted by which means those who have not the power of collation are cheated by these vile pettifoggers and know not on what terms they inherit." It is all wrong to dance on Sunday—the Almighty's fourth Commandment forbids—these Catholics are sinners for so doing, but I shall go to see them.

Sir David Carnegie was the fourth Baronet of Southesk: Osgoode was a close friend and frequently visited him at his place, Kinnaird, Scotland.

legal studies—he went to his College for some months in 1777 for his Master's Degree but soon returned to Lincoln's Inn, and was called to the Bar, November 11, 1779.[12] Unlike his friend Jekyll—who had been called the previous year at Lincoln's Inn, and speedily acquired a very large and lucrative practice—he did not attach himself to any circuit—he continued to reside in Lincoln's Inn and apparently he did not take Common Law briefs at all but contented himself with Chancery practice, in great part Equity drafting.[13]

He was a diligent student of Blackstone but did not always agree with that celebrated Commentator;[14] and in 1779 he published a volume "Remarks on the Laws of Descent and the Reasons assigned by Mr. Justice Blackstone for rejecting in his table of Descents a point of doctrine laid down by Plowden, Lord Bacon and Hale.[15] This work was highly thought of

[12] He is called in the records of Lincoln's Inn the son of William Osgoode, Queen Street, Grosvenor Square, London. See note 69 *post*.

[13] Jekyll's letters from January, 1772, till August, 1774, are addressed to Osgoode at Christ Church, Oxford; from May 12, 1775, till January, 1776, to various places in France; then till 1779, at No. 7, Old Buildings (or Old Square), Lincoln's Inn (except for a few months in 1777, when Osgoode was at Christ Church, Oxford)—March, 1778, the address is No. 21 Lincoln's Inn—and except in an occasional absence thereafter until Osgoode went to Canada, 1792, the address is Lincoln's Inn. Jekyll in a letter from Dallington, near Northampton, to Osgoode at Christ Church, Oxford, September 29, 1777, telling him about the Northampton races demands "An Answer—I repeat an Answer as you are an eminent drawer in Chancery." The present day lawyer cannot see the joke—suffice it to say that in the practice of the time now long dead, the Answer was the first pleading in Chancery of a defendant; and such pleadings were drawn by an equity draughtsman or "Drawer in Chancery."

[14] Blackstone's Commentaries of the Laws of England appeared as published at Oxford, Vol. I., 1765; Vol. II., 1766; Vol. III., 1768; Vol. IV., 1769. The volume containing the Table of Descents is Vol. II., chapter 14, pp. 202-240. Blackstone, when Osgoode wrote, was a Justice of the Court of Common Bench, having been appointed to that position in 1770, having exchanged into the King's Bench and returned to the Common Bench in the same year.

[15] This volume was published anonymously, the full title being:

"Remarks on the Laws of Descent; and on the reasons assigned by Mr. Justice Blackstone, for rejecting in his Table of Descent, a point of doctrine laid down in Plowden, Lord Bacon and Hale.

London: Printed by W. Strachan and M. Woodfall, Law Printers to the King's Most Excellent Majesty for E. Brooke, and T. Wheildon & Co., opposite Fetter Lane, Fleet Street, MDCCLXXIX."

It is a quarto of 2+47 pages.

The work is exceedingly rare; no copy is to be found in the libraries of the Inns of Court, London; the late Librarian at Osgoode Hall tried

by competent judges and may have had something to do with his appointment as Chief Justice of Upper Canada.

While at Lincoln's Inn before his appointment, he was a leading member of a small coterie calling itself "The Wits Club."[16]

for many years to procure a copy, and I have sought one in every likely quarter but in vain. I have been able to locate only three copies, two in the British Museum, one copy in bad condition, and one in the Library of the Harvard Law School. I am not without hope of obtaining one of the copies in the British Museum for Toronto. My friend, Dr. Roscoe Pound, the well-known and learned Dean of Harvard Law School, has been good enough to furnish me with an account of the book from which it appears that the point of doctrine rejected by Blackstone against the authority of Plowden, Bacon, and Halo, was that the heir of the father's mother and not the heir of the mother, was the right heir of the son. Blackstone discusses the question with great ingenuity: Comm. Bk. II., pp. 238 sqq.; and Osgoode combats his arguments.

After Christian's edition of Blackstone's Commentaries, Osgoode returns to the discussion in a quarto of 27 pages, also in the Library at Harvard, and also anonymous:

"Remarks on the inconsistency of the Tables of Descent projected by Mr. Professor Christian in the twelfth edition of the Commentaries with the doctrine laid down by Sir William Blackstone and by every writer on the Law of Descent. . . . By the authority of remarks on the Law of Descent. London: Printed by A. Strachan, Law Printers to the King's Most Excellent Majesty, for J. Butterworth, Fleet Street, 1797." (Osgoode was Chief Justice at Quebec in 1797).

Blackstone's view was subsequently declared to be law. Williams' Principles of the Law of Real Property, 22nd ed., p. 236; Challis' Law of Real Property, 3rd ed., p. 246; Watkins on Descents, 3rd ed., by Vidal, pp. 171-199. I have found no case on the subject.

It may be of interest to know what impression of Osgoode the perusal of these works have upon the acute and learned modern lawyer. Dr. Pound writes of the works of Osgoode: "They suggest one who would have liked to live in the classical common-law period, the days of Coke. . . . They suggest a man as full of the spirit of the strict law as Coke himself. Blackstone's eighteenth century regard for philosophical as distinguished from legal reasons, does not appeal to him. As he says, he writes out of 'zeal for a favorite system,' *i.e.*, the Common Law system of descent of real property; such as can provoke enthusiasm only in a Common Law lawyer."

[Since the above was written the Trustees of the British Museum have presented one copy of Osgoode's first book to the Judges' Library at Osgoode Hall. The Honourable Society of Lincoln's Inn has been so generous as to send a copy to me—this I have placed in the Riddell Canadian Library. Osgoode's second work, I can find no copy of except at Harvard. Sir Frederic George Kenyon, Principal Librarian, says: "The meshes of the Copyright Law as administered in 1797 were rather wide, and I fear this little pamphlet slipped through them." Letter January 28, 1921.]

[16] Jekyll, writing from Blandford, Dorsetshire, March 10, 1779, to Osgoode, at No. 21 Lincoln's Inn, takes advantage of a leisure hour "to ask thee how thou doest and how the Wits' Club doth? To ask thee who is the author of 'Wit in the Dumps,' a Ballad."

The reasons for his appointment, the influence brought to bear—are all unknown: whatever they may have been, Osgoode was appointed Chief Justice of the new Province of Upper Canada.

The Warrant for his appointment is dated December 31, 1791, the Province of Upper Canada having begun its separate Provincial life five days before.[17]

John Graves Simcoe, the first Lieutenant-Governor of the Province had already sailed[18] but Osgoode remained until the Spring. He set sail with Peter Russell, the Receiver-General, and John White, the Attorney-General,[19] early in the spring of 1792;[20] they met the ice on the edge of the Outer Bank of Newfoundland, May 10, and arrived at Quebec, June 2, 1792,[21] where they joined the Lieutenant-Governor.

They accompanied Simcoe to Montreal arriving about a fortnight later, and leaving Simcoe to follow they pushed on, June 21, for Kingston where they

Perhaps this Club may be the same as "The Immortal Jupiter" mentioned in Mr. Read's Life of Osgoode, pp. 23, 24.

Undoubtedly Osgoode was a man of humour himself—his letters show it—and that he appreciated humour in others is shown by Jekyll's long and frequent correspondence.

[17] The warrant (a copy of which is before me as I write) was signed by Henry Dundas.

The territory, theretofore the Province of Quebec, under the Quebec Act (1774), 14 Geo. III., c. 85 (Imp.), was divided into the two Provinces of Upper Canada and Lower Canada by Order in Council, August 21, 1791; provision was made for the Government of these two Provinces by the Canada or Constitutional Act (1791), 31 Geo. III., c. 31 (Imp.) and the Act brought into force as of December 26, 1791, by the Proclamation of Lieutenant-Governor General Alured Clarke of August 25, 1791 (in the absence of Lord Dorchester, Governor-General). See 4 Ont. Arch. Rep. (1906) pp. 158-161.

[18] Simcoe sailed for Canada in September, 1791, and arrived by "The Triton" at Quebec, November 12, 1791. Can. Arch., Q. 278, p. 1, Letter Simcoe to Dundas.

[19] White owed his appointment to Osgoode who was induced to recommend him by Samuel Shepherd, a barrister of high standing, who was a close friend of Osgoode's—and who had married White's sister. See Can. Arch., C. O. 42, Vol. 21, p. 234, for Osgoode's letter to Nepean.

[20] Dundas, writing to Simcoe from Whitehall April 10, 1792, says: "Osgoode and Russell have departed." Can. Arch., Q. 278, A., p. 1.

[21] The former date is taken from John White's diary under date May 10, 1793. See also Simcoe's letter to Dundas, Montreal, June 21, 1796, Can. Arch., Q. 278, p. 178—the latter from Mrs. Simcoe's diary, John Ross Robertson's Edition, Toronto, 1911, p. 85.

arrived June 29, Simcoe who left Montreal a day later than they, arriving at Kingston, July 1.[22]

Simcoe had been in a quandary—his Commission and Instructions directed that he was to take the oaths of office before three or more of the Executive Councillors of the Province and to administer the prescribed Oaths to the Executive Councillors.[23] Osgoode, Russell, William Robertson and Alexander Grant were named Executive Councillors:[24] Grant was the only one of the four within Canada and the Home Administration had acceded to Simcoe's request so far as to add only one other, that of James Baby of Detroit.[25] The arrival of Osgoode and Russell got over the difficulty [26] On Sunday, July 8, 1792, the Executive Council form-

[22] The travel was by boat from Lachine. The dates are given in the diaries of John White and Mrs. Simcoe. White, who travelled with Osgoode, has in his diary a few references to him—June 23, "Some thunder and rain. Pushed off with the intention of reaching Mrs. Bruce's of Williamstown—but continuing to rain and the Chief fatigued, we put into the house of a Highland settler and passed a tolerable night." June 29, "At 12 arrived in the midst of the cluster of the Thousand Isles: stopt for a pipe; showed Mr. Chief so fine a bathing place that he could not resist the temptation; caught several fish. . . ."

[23] For his Commission see 4 Ont. Arch. Rep. (1906) p. 161; for the Instructions see 4 Ont. Arch. Rep. (1906), p. 163; also Doughty & McArthur's Constitutional Documents, 1791-1818, Canadian Archives (1914), p. 33.

[24] See last named work, p. 34.

[25] It was probably at Simcoe's request that it was decided to add the name of Jacques (James) Baby of Detroit. Letter Simcoe to Dundas from Quebec, November 19, 1791. Can. Arch., Q. 278, p. 10. Of Baby he says: "I understand he is the most proper person in that district from whence it is but justice that a French gentleman of indisputable loyalty should be selected." He further says: "There is not at present any one of the Executive Council in Canada except Mr. Grant. The season will probably be very late before such a member of the Executive Council can be convened beyond the Point au Boudet as to invest me in office of Lieutenant-Governor. I submit for your consideration whether an instruction framed to enable me to call together such a description of persons for that especial purpose would or would ntt be an advisable measure." (Point au Boudet was the point on the St. Lawrence dividing Upper from Lower Canada). The suggestion was not acceded to.

Dundas wrote Simcoe from Whitehall, July 12, 1792, that it was intended that "one or two members should be added from the principal Canadians of Detroit as soon as a special selection can be made. You will, therefore, as soon as you are sufficiently acquainted with their respective merits and qualifications transmit to me the names of three or four persons of that country most qualified to fulfil the duties of so important a situation." Can. Arch., Q. 278 A., pp. 8, sqq.

[26] Letter Simcoe to Dundas, Montreal, June 21, 1792, Can. Arch., Q. 278, p. 178.

ally met at the Protestant Church appointed for the purpose by Simcoe,[27] Osgoode, Russell and Baby going thither in company with the Lieutenant-Governor," the Magistrates and principal Inhabitants." Osgoode administered the Oaths to Simcoe who in turn on the following day administered the Oaths to the three Councillors present—and the Government of the new Province was legally and formally complete.[28]

By this also another difficulty, which might have proved very troublesome, was avoided—to understand this the legal and judicial system of the Province should be made clear.

In 1788, more than three years before the Province was created, Lord Dorchester divided the territory afterwards to become the Province of Upper Canada into four Districts and erected in each District a Court of Common Pleas with unlimited civil, but no criminal jurisdiction. The Criminal Courts were of two kinds —the first was the Court of Quarter (or General) Sessions of the Peace, one for each District which was presided over by the Justices of the Peace of the District and which tried Criminal cases (generally with a Jury). While in theory the Quarter Sessions could try all cases of crime, in practice they sent capital cases to

[27] The locus is now 706-710 King Street (formerly Church Street), Kingston.

[28] An account of the formal swearing in of Simcoe will be found in convenient form in Robertson's Diary of Mrs. Simcoe, p. 116—it is correctly extracted from the Can. Arch. Land and State A., p. 1. The account of the swearing in of the Executive Councillors is as follows. Can. Arch. Land and State A, p. 2:

Monday, 9th July, 1792.
At the Council Chamber, at Kingston.

Present—

His Excellency John Graves Simcoe, Esquire, Lieutenant-Governor of Upper Canada;
The Honourable William Osgoode, Chief Justice;
James Baby;
Peter Russell;

The Honourable William Osgoode, Chief Justice, and Peter Russell took the Oaths of Allegiance, Supremacy and Abjuration and subscribed the test and also took the oath for the due execution of their office as Executive Councillors;

And the said William Osgoode, Chief Justice, James Baby and Peter Russell were severally admitted at the Council and took their seats accordingly."

the higher Court. When the appalling list of crimes from High Treason to Larceny then punishable with Death is considered, it will be seen that the higher Court was of the greatest importance. Unlike the Courts of Quarter Sessions which were permanent Courts these higher Courts were temporary. At convenient times, then generally once a year, there was issued for each District a Commission of Oyer and Terminer and General Gaol Delivery.[29] A Judge, if

[29] The Commission of Oyer and Terminer enabled the Commissioners to try all cases of alleged crime in which a true bill was found in their own Court; that of General Gaol Delivery to try all cases in which the person charged was in the common gaol of the district for which the commission was given—in practice, the two commissions were combined in one. It will amuse and perhaps interest the modern lawyer to see the form of one of these old commissions; and one of the first issued in the Province of Upper Canada is here copied:

"J. G. Simcoe.

Registered, 25th July, 1792.

Commission of Oyer and Terminer.

George the Third, by the Grace of God of Great Britain, France, and Ireland, King, defender of the faith and so forth to our trusty and well beloved William Dummer Powell, Esq'r, our first judge of our Court of Common Pleas for the district of Hesse in our province of Upper Canada and to .....Esq'rs Justices of the peace for the said district greeting know ye that we have assigned you and any three of you (of whom we will that you the said William Dummer Powell be one) to enquire by the oath of good and lawful men of the district aforesaid by whom the truth of the matter may be the better known and by other ways, methods and means whereby you can or may the better know as well within liberties as without more fully the truth of all treasons, misprisions of treason, insurrections, rebellions, murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings, and conventicles, unlawful uttering of words, unlawful assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintainances, oppressions, champerties, deceits and all other misdeeds, offences and injuries whatsoever and also the accessories of the same within the district aforesaid as well within liberties as without by whomsoever and howsoever done had, perpetrated and committed and by whom and to whom when, how and in what manner and of all other articles and circumstances whatsoever the premises and every or any of them howsoever concerning and the said treasons and other the premises according to the law and custom of England and the laws of this province for this time to hear and determine and therefore we command you that at certain days and places which you or any three of you (whereof we will that you the said William Dummer Powell be one) shall for this purpose appoint within and for the space of six calendar months from the day of the date of these presents you do concerning the premises, make diligent enquiry and all and singular the premises hear and determine and those things do and fulfil in form aforesaid which are and ought to be done and to justice doth appertain according to the Law and Custom of England and the Laws of our said Province, saving to us our Amerciaments and other things to us thereupon belonging for we have commanded our sheriff of the said

one was available, was usually named in the Commission and generally two or more others but the latter were *Rois Fainéants.*

An Indian called Snake had been killed by a soldier (another soldier being present and, it was charged, assisting) in the Mecklenburg District, in which Kingston was situated, before the formation of the Province. A commission of Oyer and Terminer and General Gaol Delivery for the Mecklenburg District was issued by the old Province of Quebec to William Dummer Powell, Judge of the Court of Common Pleas for the District of Hesse (afterwards Chief Justice Powell of Upper Canada); but it was feared that the creation of the new Province annulled the Commission and that

district that at certain days and places which you or any three of you (of whom we will that you the said William Dummer Powell be one) shall make known within and for the space of six calendar months from the day of the date of these presents he cause to come before you or any three of you (of whom we will that you the said William Dummer Powell be one) such and so many good and lawful men of his bailiwick (as well within liberties as without) by whom the truth of the premises may be the better enquired of and known and know ye further that we have also constituted and assigned you or any three of you (of whom we will that you the said William Dummer Powell be one), our justices the gaol of our said district of the prisoners in the same being for this time to deliver and therefore we command you that at a certain day which you or any three of you (of whom we will that you the said William Dummer Powell be one) shall appoint you, do meet at Detroit our gaol of our said district to deliver and to do thereupon what to justice may appertain according to the Law and Custom of England and the Laws of our said Province (taking to yourselves William Roe and Charles Smyth of Detroit, in our said district Esq'rs, or either of them as clerkes to this commission), saving to us our Amerciaments and other things to us thereupon belonging for we have commanded and hereby command our sheriff of our district of Hesse, that at a certain day which you or any three of you (of whom we will that you the said William Dummer Powell be one), shall appoint you do meet at Detroit our gaol of our gaol and their attachments before you or any three of you (of whom we will that you the said William Dummer Powell will be one) then he cause to come.

In testimony whereof we have caused these our letters to be made patent and the Great Seal of our said Province of Upper Canada, to be hereunto affixed, Witness our trusty and well beloved John Graves Simcoe, our Lieutenant-Governor and Commander-in Chief of our said Province. At our Government House, in the Town of Kingston, this .....day of.....in the year of our Lord One thousand seven hundred and ninety-two and of our Reign the thirty-second.

J. G. S.

William Jarvis, Secretary.

consequently a Court held thereunder would be illegal. All difficulty was, however, avoided by the issue of a Commission by Simcoe to Osgoode.[30]

Osgoode became the Chairman of the Executive Council which position he occupied as long as he remained Chief Justice of the Province and in which he was succeeded by his successor as Chief Justice. By the Royal Instructions to Simcoe, he was also named as a Legislative Councillor along with Robertson (who never acted and in a short time resigned) Grant, Russell, Richard Duncan of Rapid Plat, John Munro of Matilda, Robert Hamilton of Niagara and Richard Cartwright, Jr., of Kingston; and all these duly received a summons to serve in the Legislative Council.

The other House of Parliament, the Legislative Assembly, was to be elected by the people; and Simcoe, on the advice of the Executive Council issued a proclanation dividing the Province into sixteen constituencies.[31]

Osgoode whose sole practice had been in Chancery presided over the Court of Oyer and Terminer and General Goal Delivery (the Criminal Assizes) at King-

[30] Simcoe, in a letter to Dundas, from Montreal, December 7, 1791—Can. Arch., Q. 278 pp. 23, sqq., says:—"A cause of great importance is to be tried at Kingston, by Judge Powell . . . in order to render this proceeding legal I ought to issue a proclamation authorizing the Courts of Judicature to act under the Canada Bill." He had been advised by Mr. Ogden, a well known lawyer of Quebec, that he could not issue such a proclamation until he had taken the oaths before the Executive Council.

Chief Justice Smith, of Quebec, told Simcoe that he would have no trouble with Powell and probably he was right; but all question was avoided by issuing a new Commission.

Kingsford, History of Canada, Vol. 7, p. 342, gives an account which is misleading: his mistakes are perhaps pardonable as he might well think Powell took the Court without objection, in the absence of the evidence of the documents in the office of the Secretary of State at Ottawa, (including the commission issued to Osgoode) which Kingsford never saw, and of John White's diary (still unpublished) which he could not see. Kingsford is singularly inaccurate in almost everything connected with Powell.

[31] For the proclamation dated July 16, 1792, see 4 Ont. Arch. Rep., (1906), pp., 176, sqq.: Doughty and McArthur, pp. 77, sqq. The Canada Act, sec 17, provided that the number of members of the Legislative Assembly should be not less than 16. Simcoe says that the Militia returns were used in equalizing the numbers for representatives in the Assembly, Can. Arch., Q 278, pp. 197, sqq.

ston, August 23 and 24, 1792; he "gave a most excellent charge" to the Grand Jury. The two soldiers accused of the murder of the Indian were acquitted as was a man charged with sheep-stealing.[32] White who had been elected member for Leeds and Frontenac and had "been dragged about in a chair to the diversion of the mobile and my inconvenience"[33] prosecuted for the Crown. Osgoode was apparently not in good health part of the time of his stay at Kingston; he with with White and others, September 2, left Kingston for the Capital Niagara (renamed by Simcoe, Newark[34]), the "Onondaga" made the trip in 29 hours and Osgoode arrived safe at the scene of his future labors for nearly two years. His salary by the way was £1,000 sterling. Niagara was a poor little hamlet and houses were few and hard to obtain; Simcoe took the Chief Justice into his own home, Navy Hall, for more than three months; he then was able to secure a house of his own near to Navy Hall.[35]

The Legislature had been summoned for Monday, September 17; and Osgoode was called upon to prepare legislation. He was made Speaker of the Legislative Council[36] but that rather increased than diminished

[32] John White's Diary, under date Saturday, August 25, 1782—"Simcoe has left for Niagara, Monday, July 23" (White says Monday, July 24, but he is in error as to the day of the month for July and part of August, 1792.)

[33] John White's Diary, under date Friday, August 10, 1792. The New English Dictionary tells us "mobile," as a contraction for "mobile vulgus," the excitable crowd or rabble, is as old as 1600: our modern contraction "mob" does not appear till near the end of the 17th century.

[34] After Newark, New Jersey, with which Simcoe had been acquainted during the Revolutionary War.

[35] Mrs. Simcoe's Diary, p. 145, December 31, 1792: "Mr. Chief Justice Osgoode is now in his own house, which is so near that he always came in an evening to make up our party.

Till within this fortnight he resided in our house, not having been able to meet with any that suited him, and Col. Simcoe finds him a very agreeable companion."

White, for a time, slept in Simcoe's Marquee.

[36] This position was occupied by all the Chief Justices of Upper Canada, in their time until the Union in 1841: they did not fill the position *ex officio* as stated by Major-General Robinson, C.B., in his "Life of Sir John Beverley Robinson," Blackwoods, 1904, at p. 200: they were appointed by the Crown, *i.e.*, the Lieutenant-Governor—see 31 Geo. III., c. 31, s. 12—as the speaker of the Senate is to-day. William Dummer

his responsibility. He had charge of the legislation in the Legislative Council while the Attorney-General took charge in the Lower House.

All the Legislative Councillors (including James Baby) who had received a summons appeared except Richard Duncan and William Robertson; the latter resigned shortly afterwards [37] and the former made his appearance in the following session.[38]

After the formal proceedings, the Lieutenant-Governor's speech from the Throne and the Address in Reply, the first business was a motion by Mr. Cartwright seconded by his friend William Hamilton, for leave to bring in a Bill to legalize marriages theretofore contracted in Upper Canada. This was a very troublesome question; it is not intended to give the full story here. Suffice it to say that the English law as well as the French-Canadian law, required the marriage ceremony to be performed by a clergyman in Holy Orders episcopally ordained. A number of marriages had in the absence of such ecclesiastics been solemnized before the Commanders of the Military Posts, sometimes before the Surgeons; Richard Cartwright had himself gone through a ceremony of that kind and naturally desired his spouse to be a wife in law as in fact and his children legitimate. This is not the place to give a full account of the proceedings; it will suffice to say that Cartwright introduced his Bill and it received the first reading. At once negotiations were set on foot by the Lieutenant-Governor who was an intense partisan for the rights and privileges of his beloved Church of England, Osgoode acting with him; and finally, Cartwright was induced to withdraw his Bill upon the promise that the whole question would be taken up with the Home

Powell was Speaker of the Legislative Council before he was Chief Justice and in Chief Justice Scott's incumbency, and Jonas Jones was Speaker later, who was never a Chief Justice at all.

[37] See letter, Simcoe to Dundas, Navy Hall, November 4, 1792, Can. Arch., Q. 279, pt. 1, pp. 8, 9.

[38] Monday, June 17, 1792, 7 Ont. Arch. Rep. (1910), p. 21. Duncan's case is one of the unhappy episodes of Upper Canada; he did not long continue a Councillor—I do not pursue the story.

Authorities after the Session.[39] To complete the story—Osgoode was instructed to draw up a Bill for the purpose; he did so and the draft Bill was sent to London and there submitted to the Law Officers of the Crown; they advised certain important changes and the Bill was passed the following year (1773).[40] Osgoode took a leading part in promoting the Statute introducing the Law of England in matters of property and civil rights and the Statute directing all issues of fact to be tried by a jury;[41] and the session passed without much friction.

After the session he was busied supervising the deeds of Indian lands[42] and in other administrative matters. During all his stay in Upper Canada he was President of the Executive Council and took his full share of the work of that very important body.

[39] Simcoe, reporting to Dundas, from the Navy Hall, November 4, 1792, Can. Arch., Q. 279, pt. 1, p. 79, sqq., says: "The favorite Bill in the Legislative Council is the Bill to make valid the irregular marriages already contracted in the Province; two of the members and almost all the Province are in that predicament—a hasty and ill-digested Bill was brought forward by a leading character who is personally concerned (Cartwright) and it was only on our express promise that a Draft of a Bill should be prepared for the opinion of Government and sent home this winter that he was induced to withdraw his measure. This is a circumstance which requires the serious and immediate consideration of Government. The people seem very desirous of availing themselves of regular sanctions though they have had but little opportunity."

[40] The Draft Bill was sent forward to Dundas, by Simcoe, from Navy Hall, December 6, 1792, Can. Arch., Q. 279, pt. 1, p. 169—along with an elaborate report by Cartwright: it was submitted by Dundas to the Law Officers of the Crown, May 22, 1793; the Law Officers, William Scott, Advocate-General (afterwards Lord Stowell, Judge of the High Court of Admiralty) John Scott, Attorney-General (afterwards Lord Eldon, Lord Chancellor) and John Mitford, Solicitor-General (afterwards Lord Redesdale, Lord Chancellor, a great friend of Osgoode's) gave their opinion and suggestions, June 24, 1793. The Wolford Manor Papers contain the only copy of this that I have seen. The Bill became law as (1793), 33 Geo. III. c. 5 (U. C.). It was not wholly satisfactory as it failed to make provision for the marriage of "Dissenters" by their own ministers—see "Life and Letters" of the Hon. Richard Cartwright, Toronto, 1886, p. 52; the defect was in part supplied by the Act of (1798) 38 Geo. III, c 4 (U. C.) and better by the Act of (1830) 11, Geo. IV. c. 36 (U. C.), that of (1857), 20 Vic. c. 66 (Can.), and that of (1896), 59 Vict. c. 39 (Ont.). For the proceedings on the Marriage Bill in the Legislative Council in 1792, see 7 Ont., Arch. Rep. (1910), pp. 2, 3, 4, the Bill was introduced September 18, and withdrawn September 21, 1792.

[41] (1792) 32 Geo. III, cc. 1, 2, (U. C.).

[42] John White's diary under dates January 13, 14, 15, 1793.

He never had, until almost the end of his term, any original civil jurisdiction in the Province, the Courts of Common Pleas being seized of all civil cases; but he was appointed to preside over Courts of Oyer and Terminer and General Gaol Delivery and acquitted himself well in that responsible position.[43] Except the Court at Kingston, already mentioned, he sat in none of these Courts until after the session of Parliament of 1793.

This session of Parliament saw changes in the Courts for the Probate of Wills, in the law of marriage and in some other matters of less importance. But the glory of the session was the Bill abolishing future slavery.[44] Simcoe hated slavery and had spoken against it in England, when a member of Parliament; his attention was forcibly called to its evils by a shocking case of the brutal exercise by a slave owner of his legal rights.

[43] Mr. Read notes that Osgoode sat in Courts of Oyer and Terminer as follows:—

1792, August 23, for District of Mecklenberg, at Kingston.

1793, August 8, for District of Mecklenburg, at Kingston.
August 14, for Eastern District, New Johnstown.
December, Home District, Newark.

1794, July, Eastern District, Cornwall.

In only the first and second of these are the Commissions on file, the last may be doubtful.

"Lives of the Judges," pp. 19-22.

[44] It has been said that it was in consequence of his charge to a Grand Jury that slavery ought not to exist in the colony of Canada, that the legislature of Upper Canada passed in July, 1793, the Act entitled "An Act to prevent the further introduction of slaves and to limit the terms of contracts for service within the Prvoince," Robertson's "Diary of Mrs. Simcoe," pp. 75. 76. No authority is given for this statement and it is quite unfounded. Osgoode addressed only one Grand Jury before the Session of 1793, that at Kingston in August, 1792, and it is as certain as anything negative can be that he made no such address to that Grand Jury.

It has also been said that in 1803, Chief Justice Osgoode declared slavery inconsistent with the laws of Canada. Taylor's "Cardinal Facts of Canadian History" Toronto, 1899, p. 88. This is also without foundation; Osgoode never was Chief Justice at Montreal and the position he did hold, viz. Chief Justice at Quebec, he resigned when he went to England in 1801. It is probable that a judgment, at Montreal, in 1800, by Chief Justice James Monk, is the foundation for the story. See my work "The Slave in Canada" Washington, D. C., (1920), pp. 49, 50, and notes.

The following is a report of a meeting of his Executive Council: "At the Council Chamber, Navy Hall, in the County of Lincoln, Wednesday, March 21st, 1793.

Present

His Excellency, J. G. Simcoe, Esq., Lieutenant-Governor, &c., &c.,

The Honorable Wm. Osgoode, Chief Justice,

The Honorable Peter Russell.

Peter Martin (a negro in the service of Colonel Butler) attended the Board for the purpose of informing them of a violent outrage committed by one Fromand, an Inhabitant of this Province, residing near Queens Town, or the West Landing, on the person of Chloe Cooley, a negro girl in his service, by binding her, and violently and forcibly transporting her across the River, and delivering her against her will to certain persons unknown; to prove the truth of his Allegation he produced Wm. Grisley (or Crisley).

William Grisley, an Inhabitant near Mississague Point, in this Province, says; that on Wednesday evening last he was at work at Mr. Froomans near Queens Town, who in conversation told him, he was going to sell his Negro Wench to some persons in the States, that in the Evening he saw the said Negro girl tied with a rope, that afterwards a Boat was brought, and the said Frooman, with his Brother and one Vanevery, forced the said Negro girl into it, that he was desired to come into the boat, which he did, but did not assist or otherwise concerned in carrying off the said Negro Girl, but that all the others were, and carried the Boat across the River; that the said Negro Girl was then taken and delivered to a man upon the Bank of the River by Froomand, that she screamed violently and made resistance, but was tied in the same manner as when the said William Grisley first saw her, and in that condition delivered to the man * * * Wm. Grisley farther says that he saw a Negro at a distance, he believes to be tied in the same manner, and has

heard that many other People mean to do the same by their Negroes.

Resolved, That it is necessary to take immediate steps to prevent the continuance of such violent breaches of the Public Peace, and for that purpose, that His Majesty's Attorney-General be forthwith directed to prosecute the said Fromond.

Adjourned.'"[45]

A Bill for the abolition of future slavery was introduced into the Assembly by the Attorney-General, John White, and passed unanimously; in the Council it received a few trifling amendments concurred in by the Assembly and it became law.[46]

After the session of 1793, Osgoode presided at Courts of Oyer and Terminer and General Gaol Delivery until the end of the year.

December 6, 1793, died at Quebec, William Smith who had been Chief Justice of Lower Canada from the

[45] Can. Arch., Q. 282, pt. 1, pp. 212, sqq. See "The Slave in Canada," pp. 55-56.

[46] Osgoode almost certainly drew or helped to draw the Bill; but Simcoe deserves most of the credit for the measure. It was not universally popular; that it was due to Simcoe's influence is plain from contemporary private documents. In a letter by Hannah Jarvis, wife of Mr. Secretary Jarvis, to her father, the Rev. Samuel Peters, dated at Newark (Niagara), September 25, 1793, she says:—"He (i. e. Simcoe) has by a piece of chicanery freed all the negroes, by which move he has rendered himself unpopular—with those of his suite, particularly the Attorney-General, Member for Kingston, who will never come in again as a representative. "Jarvis-Peters-Hamilton Papers, Can Arch. And the Attorney-General never did "come in again as a representative." After Simcoe went back to England and during the regime of Peter Russell, in 1798, a Bill to allow immigrants to bring their slaves passed the Assembly by a vote of 8 to 4, but received the "three months' hoist" in the Council; Osgoode was at that time Chief Justice at Quebec. Simcoe gives an interesting and amusing account of how the original Bill was passed in a letter to Dundas, dated from York, September 28, 1793. "The greatest resistance was to the Slave Bill—many plausible arguments of the demand of labour and the difficulty of obtaining servants to cultivate lands were brought forward. Some possessed of negroes knowing that it was very questionable whether any subsisting law did authorize slavery and having purchased several taken in war by the Indians at small prices, wished to reject the Bill entirely; others were desirous to supply themselves by allowing the importation for two years. The matter was finally settled by undertaking to secure the property already obtained upon condition that an immediate stop should be put to the importation and that slavery should be gradually abolished." Can. Arch., Q. 279, pt. 2, pp. 335, sqq.

beginning of the separate provincial career of the Province and before 1791 from 1786, Chief Justice of Quebec. Osgoode desired the position and February 24, 1794, a mandamus was issued by Dundas for Letters Patent of the Province of Lower Canada to be passed appointing him Chief Justice of the Province in the room and stead of William Smith.[47]

But this mandamus was not at once acted upon; Simcoe had need of him in the Upper Province for a very important purpose; and Osgoode remained. Simcoe was a most ardent admirer of everything English and was not satisfied with the existing judicial system in which there was no court of universal jurisdiction throughout the whole Province but the civil jurisdiction was divided between four courts, each with its own territorial limits. Osgoode as was to be expected also preferred the English to the Canadian way. Simcoe

[47] It may be of interest to see the exact terms of this Mandamus—the appointments of Osgoode to the Lower Province have been confused; the facts I have from the official documents in the office of the Secretary of State, Ottawa.

"GEORGE R.

Fiat received and recorded in the Office of Enrollments at Quebec, the 29th day of July, 1794, in the Register of Mandamus's, Folio 4. Geo. Pownall.

Right trusty and well beloved we greet you well, whereas we have taken into our royal consideration the loyalty, integrity, and ability of our trusty and well beloved William Osgoode, Esquire, we have thought fit hereby to authorize and require you forthwith to cause Letters Patent to be passed under the seal of our Province of Lower Canada, in America, constituting and appointing him, the said William Osgoode, our Chief Justice of and in our said Province, in the room of William Smith, Esquire, deceased: To have, hold, exercise and enjoy the said office unto him the said William Osgoode, for and during our pleasure and his residence within our said province, together with all and singular, the rights, profits, privileges and emoluments unto the said place, belonging in the most full and ample manner, with full power and authority to hold the Supreme Court of Judicature at such places and at such times as the same may and ought to be held within our said Province, and for so doing this shall be your warrant and so we bid you heartily farewell. Given at our Court at Saint James's, the twenty-fourth day of February, 1794, in the thirty-fourth year of our reign. By His Majesty's Command.

(Signed) Henry Dundas.

William Osgoode, Esq., Chief Justice of the Province of Lower Canada.

To Our Right Trusty and Well beloved Guy Lord Dorchester, K.B., our Captain-General and Governor-in-Chief in and over Our Province of Lower Canada in America, or in his absence to Our Lieutenant-Governor or Commander-in-Chief of Our said Province for the time being."

had the power under his commission and instructions to make the changes; but he knew that it would be unpopular in certain quarters and he thought it wiser that the Legislature should act by Statute. Accordingly he requested Osgoode to draw up a Bill to change the system; Osgoode did so; the Bill was brought before the Executive Council and on the Council approving, the Bill was introduced in the Legislative Council by Peter Russell, the Receiver-General. It was opposed by Cartwright and Hamilton, but was carried, all the other Councillors voting for it. The House of Assembly passed it rapidly, it was approved and became law. Thus what is substantially our present system for the first time made its appearance in the Province.[48]

The Act abolished the existing Courts of Common Pleas and created a new Court "His Majesty's Court of King's Bench for the Province of Upper Canada" with all the powers both in civil and in criminal matters of the Courts of King's Bench, Common Bench or (in matters of revenue) Exchequer in England. A practice not identical with but very like that in the English Court of King's Bench was prescribed; and "His Majesty's Chief Justice of the Province together with two Puisne Justices shall preside in the said Court."

This Act received the Royal Assent, July 7, 1794. Osgoode's task was accomplished, and on the following Sunday, July 13, 1794, he set sail from Newark for Quebec.[49] He consequently never presided in the Court

[48] The Judicature Act or King's Bench Act, as it is called indifferently, is (1794) 34 Geo. III, c. 2, (U. C.). The quoted words are from Section 1 of the Act.

The Proceedings in the Legislative Council appear in 7 Ont. Arch., Rep. (1910), pp. 40-53; in the House of Assembly, the record of the Proceedings is lost, see 6 Ont. Arch. Rep. (1909), pp. XI., 47, sqq.

[49] Mrs. Simcoe's Diary under date Sunday, July 13, 1792, p. 229. Mr. Robertson says: "Mrs. Simcoe must have been in error as to the date of prorogation . . . for official records show that it took place on the 9th July, and not on the 7th." Mr. Robertson is himself in error; the official records agree with Mrs. Simcoe in the date, July 7.

The Gazette of August, 1794, quoted by Dr. Scadding in his interesting and valuable "Toronto of Old," Toronto, 1873, p. 513, says: "On

of King's Bench in Upper Canada which sat for the first time October 6, 1794,[50] (as we shall see) and at most twice at Nisi Prius.[51] He stopped at Cornwall to take the Court of Oyer and Terminer and General Gaol Delivery for the Eastern District and there, John White prosecuting, on July 20 and 21, he tried a case of murder and one of perjury. As he had a Commission on Nisi Prius he sat also as a civil trial tribunal. These were his last official acts in Upper Canada. He made his way to Quebec where he arrived July 27, 1794.[52] His patent as Chief Justice of Lower Canada in succession to William Smith issued the following day.[53]

Thursday, the 1st instant, His Majesty's armed vessels, the Onondago and the Caldwell, sailed from this place (Niagara). The former for Kingston, had on board the Hon. William Osgoode, Chief Justice of this Province, and John White, Esquire, Attorney-General, who are going to hold the courts at Kingston and Johnstown." The date is certainly wrong: John White's accounts passed by the Executive Council have the dates of the circuits positively fixed and he could not be mistaken.

[50] The King's Bench Term Books are extant and in the Ontario Archives—for the first three sittings, October 6 and 11, 1794, and January 19, 1795, William Dummer Powell sat alone.

[51] From the accounts in the Wolford Manor Papers it would appear that Osgoode tried the following cases at his courts of Oyer and Terminer:

1792. August—at Kingston—William Robertson and another, murder.
William White, sheep stealing.
1793, August 7, at Kingston—David Sutherland, murder.
August 8, at Kingston—George Andrews, burglary.
August 14, at New Johnstown—Joseph Saluce, murder.
1794, July 20, at Cornwall—William White, murder.
21 at Cornwall—William Wharffle, perjury.

There is no account for the Niagara Court, December, 1793. A Commission of Nisi Prius issued along with the Commission of Oyer and Terminer, &c., to Osgoode, for the Eastern District, 1794, and therefore he sat that once in a civil trial court. I know of no record of the civil proceedings at that court and cannot say whether there was more than a merely technical sittings.

The Court of Oyer and Terminer, &c., with a Commission of Assize and Nisi Prius, sat at Kingston for the Midland District, August 4, 1794: it is possible, perhaps even probable, that Osgoode presided over that Court. If so, his arrival in Quebec must have been later than that given by Kingsford—see next note. If he took the Court at Kingston he tried Tom, a negro boy, for larceny, and John Birch for receiving stolen goods. I know of no record of the Civil proceedings at this sitting, if there were any.

[52] Kingsford, Hist. Can., Vol. VII., p. 402.

[53] From a copy furnished me by the Secretary of State, Ottawa—the Mandamus as Executive Councillor is dated May 5, 1794; it is signed by Dundas.

A statute of the Province of Lower Canada passed late in the previous year [54] constituted two Courts of King's Bench for the Province, one at Quebec and the other at Montreal, each with four justices, a Chief Justice and three Puisnes. At Quebec, the Chief Justice of the Province presided. Consequently Osgoode received a Patent as Chief Justice of the Court of King's Bench of the District of Quebec.[55]

Simcoe felt the removal of the Chief Justice as an irreparable loss but the position was not filled during his stay in the Province.[56]

It is not intended here to describe in detail Osgoode's career in the Lower Province. It was not pleasant or without incident. He quarrelled with Prescott, the Lieutenant-Governor, and afterwards with Milnes, his successor, and finally left for England in 1801. He does not seem to have formally resigned his position until May, 1802, when he retired with a pension of £800.[57] He arrived in England apparently in July, 1801, in good health and spirits and took up his residence in the Temple.[58] Never very desirous of pre-

[54] (1793) 34 Geo. III. c. 6 (L. C.)—the Parliament did not meet till November 11, 1793.

[55] The Patent is dated December 11, 1794; this apparently unnecessary patent has caused much of the confusion in respect of Osgoode's appointments.

[56] Writing to the Under Secretary of State for the Home Department, John King—the Colonies were from 1782 till July 11, 1794, under the Home Department—Simcoe, June 20, 1794, says: "I shall feel an irreparable loss in Mr. Chief Justice Osgoode. I hope to God he will be replaced by an English lawyer." Can. Arch. Q. 280, pt. 1, p. 176. No appointment was made until after Simcoe had left Canada, in 1796; John Elmsley was appointed later in the same year. Simcoe's desire for an "English lawyer" to be appointed Chief Justice was a slap at the pretensions of William Dummer Powell, the sole puisne Judge. Powell was an American by birth and although educated at Westminster in law, was not called to the English Bar. For reasons hardly credible now and not at all to the discredit of either, Simcoe never liked and never fully trusted Powell.

[57] Sufficient of the career and actions of Osgoode at Quebec will be found in Kingsford, Hist. Can., Vol. VII; Kingsford seems in this matter to have taken more pains than was his wont to acquire an accurate knowledge of the facts.

[58] A letter from a close friend, Richard Clerke, of Kingston, Totsworth, Oxfordshire, August 10, 1801, is addressed to him at "No. 16 Mitre Court, Temple, London"—until December, 1803, the same address

ferment, not too fond of his profession and having ample means for his bachelor wants, he gave himself over to ease and modest luxury.

Always fond of the hunt he was able to devote to it his whole time during the season [59]; of a hospitable turn he had sufficient means to entertain his friends with good cooking and "Superbo" wines.[60] He was

is retained—December 10, 1808, the address is "Brighton"—thereafter till the close of the correspondence, June 6, 1816, it is "Albany" or "Albany House," London. Others address him at 4 A Albany.

[59] His friend, Richard Clerke, speaks more than once of Osgoode's hunters. Jekyll was married a few days after Osgoode's arrival in England; he began at once an animated correspondence with him, beginning the first letter, August 2, 1801, with the lines:

"C'en est fait. Je me marie
Il faut vivre en Caton;
S'il est un Tems pour la folie,
Il en est un pour la Raison."

Many times he refers to Osgoode's manner of life.

March 15, 1803. "One whose equitation is over hedges and ditches and diametrically opposed to the straight line of a Turnpike Road." March 1, 1804. "Your routine has, I suppose, been as usual, hunting, good society and good dinners . . . you idolize idleness, I, occupation—we both can command now our various delights." March 27, 1804. "Why should you be is a sort of apologetic to me for hunting? Have you not a fair right to your pleasures? You are an easy, rich, indolent batchelor. Hunting is your pleasure. You have good right to enjoy your pleasure. You went into exile to purchase that independent income which can afford the pleasure you prefer . . . Men say why should a man with intellects like Osgoode's absorb himself in hunting? Men said why was Jekyll a coxcomb, a man of bonne fortune, &c., &c.,? Why Jekyll liked his course and Osgoode likes his course . . . We have not ten years more to live and are we to live to please these critics who would not care if we were hung?" July 23, 1804. "You have enough (money) as a batchelor." November 26, 1806. "I can guess that you are hunting, lounging, reading French trash, eating, drinking and playing at whist."

[60] Jekyll, advising if not quite urging him to marry, says, March 27, 1804, "With your quietism, hospitable turn, talents and good nature, you would be the happiest man on earth with a pleasant wife and a rosy boy like my Joseph." Jekyll, indeed, well knows the suggestion, "I know thou dost compare this tirade to the craftiness of one Reynard who had lost his tail," September 24, 1802. Richard Clerke, August 7, 1808, takes up his "pen to present my thanks to you, most liberal sir, for a smart fit of the gout occasioned in a great measure by your luxurious dinners and Superbo wines."

February 2, 1809, he says: "I know you stick up your nose at kitchen wines," and asks his advice about "a good tap of port," of which to buy a hogshead for his own use. March 21, 1809, rallying Osgoode as a "most melancholy Jacques" on his sombre epistle—in which he was supposed to have expressed fears of an early invasion of England by Bonaparte, Clerke says: "I advise you by all means to get a permit and send all your Superbo wines to my cellar at Kingston where they shall be properly taken care of. All my neighbours are unanimous in offering the same advice."

not, however, given to excess [61] and he led the ordinary life at the time of a man of the world in easy circumstances, an Epicurean existence, doing no harm to anyone and little good even to himself.[62]

He does not seem to have taken any interest in politics [63]—perhaps he had had enough of politics at Quebec—or in literature. His range of friends was great as to number but not as to class; he was loved and esteemed by his old friends but does not seem to have cared to make new ones.[64]

Passports which have been preserved indicate that he travelled to France in the latter part of 1814, when Napoleon was in Elba; and in 1816 after Napoleon's final defeat. On the latter occasion he also visited the Low Countries and no doubt saw the field of Waterloo.

This easy life he led for more than twenty years, but in 1823 his health began to fail. He had accepted a place on a Committee of Inquiry into fees in the Courts of Justice, but was unable to do full justice to the matter. He grew worse as time went by and at length, January 17, 1824, he passed away at his Cham-

[61] There is one letter from his close friend, Meyer Schomberg, indicating that when at college a young man of 20, he indulged too freely. March 21, 1774, "Your best friends vent bitter complaints against you—and to say the truth the cause of your neglect of them is worse than your neglect itself. I am infinitely concerned to think that you should blast your understanding with liquid lightning. I would preach to you on this subject if I did not know that you can bring stronger arguments against yourself than I can offer." Jekyll (before Osgoode went to Canada) talks frequently in a bantering manner of their getting drunk together to talk Metaphysics, etc., etc.; but this is obviously just the chaff of intimate friends. Nothing whatever indicates want of self-control or undue indulgence in wine.

[62] September 5, 1809, Jeykll writes "Conquer the constitutional idleness and write to me." September 14, 1809, "You say you are happy if you feel no bodi'y pain; you are a better moralist than I am—I am furious if I have no positive pleasure."

[63] Only once does he seem to have taken part in politics and then only as a paid speaker. Jeykll writing from Wells—the letter is not dated, but it must have been some time in 1788—to Osgoode, says, "Nat. Snowden and all of us are delighted with your debut on the Hustings. I am sure it will be of still more advantage to you than the Rhino which will be no bad viaticum for the Rhine-O!"

[64] Lord Redesdale asks him to a "family dinner," but him, Osgoode had known as John Freeman Mitford when they were both young barristers.

bers in the Albany at the age of seventy.[65] He had never married.

The portrait of Osgoode now at Osgoode Hall[66] shows him to have been a man of fine presence with a handsome and refined face.

His correspondence bears out the character which is given him—"No person admitted to his intimacy ever failed to conceive for him that esteem which his conduct and conversation always tended to augment."[67]

While he left no mark upon the jurisprudence of this Province, his name will be perpetuated by the title of the building, Osgoode Hall, the seat of our Superior Courts, which was named after him at the instance of one who became one of the most illustrious of his successors.[68]

[65] Annual Register, 1824, p. 205.

From Jekyll's affectionate letters, it would appear that he suffered from hæmaturia, that this was treated by cupping but continued, that while Osgoode became more moderate in diet and wine, he "swilled table beer," that he had a constant cough which prevented sleep and natural rest, that premonitory symptoms of apoplexy were apparent, bleeding at the nose, etc., and that he was a rather recalcitrant patient. I have nowhere seen any account of the immediate cause of his death; but many facts point to cerebral hæmorrhage.

[66] This is a copy by our well-known Toronto artist, Berthon, of the original at Wolford Manor, England.

[67] The "Canadian Review," July, 1824, quoted by Dr. Scadding in his "Toronto of Old," p. 314. Dr. Scadding is certainly in error in making Chief Justice Osgoode one of the pewholders in St. James' Church, Toronto, from its commencement to about 1818. "Toronto of Old," p. 138. Osgoode never lived in York (Toronto) and the first church was not built until 1803—do., do., p. 118.

[68] John Beverley Robinson, who became the seventh Chief Justice of Upper Canada in 1829.

SUPPLEMENTARY NOTE.

[69] William Osgood, the father, seems to have come to London from Hampshire in the fourth decade of the 18th century; the celebrated John Wesley writing in his journal of date Sunday, December 13, 1767, says: "I am desired to preach a funeral sermon for William Osgood. He came to London over thirty years ago and from nothing amassed more and more till he was worth several thousand pounds." "The Journal of the Rev. John Wesley, edited by Nehemiah Curnock," London, Charles H. Kelly, n.d. Vol V., p. 245.

He early came under the influence of Charles Wesley, who called him his son—writing to his wife in 1764, Charles Wesley says: "I called on my beloved son, William Osgood, who is swiftly declining and ripening for glory." "The Journal of the Rev. John Wesley," Vol. II., p. 242—

while John Wesley speaks of visiting "Brother Osgood," do. do., Vol. II., p. 363 (July 2, 1740), 461 (June 5, 1741).

Osgood (who always spelled his name without the final "e") and his wife Martha had only one child, William, who was born in 1754 and was only in his fourteenth year when his father died in 1767—the elder Osgood had one brother, John Osgood, of Bishop Sutton, Hampshire, and a number of cousins of the name of Osgood in Hampshire, Sussex and Berkshire whom he remembered in his will, dated October 5, 1767. He seems also to have had a sister to whose daughter, Eleanor Copley, he left twenty pounds—he had also a cousin of the name of John Gates in Surrey, and another called William Taylor.

That he was a "good man and died in peace" John Wesley bears witness, though he says: "I believe his money was a great clog to him and kept him in a poor low state all his days, making no such advance as he might have done either in holiness or happiness." He left "to the poor of Mr. John Wesley's society twenty pounds to be distributed amongst them as the stewards think fit"—and directed that he should be "buried in the burying ground called Bunhill Fields, decently but without pomp, and that if the Rev. John or Charles Wesley are in town at my decease, I give one of them five guineas for reading the funeral service over me and preaching a sermon in West Street Chappel."

In his will he describes himself as "of Queen Street in the parish of Saint George, Hanover Square, in the County of Middlesex, Gentleman." He appointed his wife, William Surgey and Edward Webster, Executors and also guardians of his infant son William, and allowed the interest on £2,000 "for his education and maintenance . . . till he arrives at the age of twenty-one years." The son was entered at Christ Church, Oxford, July 12, 1768, as "William Osgoode, son of William Osgoode of St. Martin's, London, gentleman." The Dean of Christ Church confirms Foster Alumni Oxonienses III., p. 1047, that the name is spelled with a final "e" in the Matriculation Lists (Letter to me, October 12, 1920). Notwithstanding this orthography, William continued to spell his name in the same way as his father for several years, and letters from his most familiar friends were addressed in the same way — the first time Jekyll used the final "e" was September 7, 1781, and Schomberg never used it at all. His own letters as late as 1776 are signed "W. Osgood," "Will Osgood," and he speaks of himself as "Mons. Osgood." He was graduated B.A. as "Osgoode" in 1772, and was entered of Lincoln's Inn, November 4, 1773, as "Osgoode, William, son of William Osgoode of Queen's Street, Grosvenor Square in the County of Middlesex, armiger, deceased." Apparently the fact of his receiving his call under the name "Osgoode" determined him to change the spelling of his name, and certainly his Warrant and Commission as Chief Justice in 1792 were with the final "e," and we see no more of the shorter spelling.

None of the asceticism of the early Methodists is to be found in Osgoode's life—he was rather a Sybarite; but it is possible—I think probable—that his early association with the Wesleys rather prevented him going so far and so violently as Simcoe in support of the exclusive claims of the Church of England in the Colony.

His own will—holograph and dated August 16, 1818, with codicils, August 14, 1821, and August 16, 1823—is characteristic of the man. Ten guineas for mourning rings to each of his friends, the Reverend Robert Nares (the well known philologist), the Reverend Sackville Bale, Joseph Jekyll, Esqre., (the celebrated barrister and wit), the Right Honourable Nathaniel Bond, the Right Honourable Sir William Grant (Master of the Rolls), Barne Barne, Esqre., Mr. Serjeant Manley John Campbell, William Alexander (Master in Chancery), and twelve

others—to John Noyes, Clerk of the Commission of Inquiry into the Fees of the Courts of Justice, £1,000, and to certain old friends the same or larger amounts; his wines are divided amongst two named friends, his servants receive one year's wages. His silverware, clocks, etc., are duly bequeathed, and charities are not wholly overlooked, £500 to the Marine Society, £100 to the St. George's Hospital, and £100 to the Middlesex Hospital. He leaves nothing to any relative at least designated as such; his estate was sworn under £35,000, a very fair fortune anywhere a hundred years ago, and for a Canadian Judge even now magnificent—*crede experto.*

ROBERT ISAAC DEY GRAY—THE FIRST SOLICITOR-GENERAL OF UPPER CANADA—1797-1804

By William Renwick Riddell, LL.D., F.R.S. (Can.)
Justice of Supreme Court of Ontario.*

When Upper Canada began her active Provincial career in 1792, there were only two regular certificated lawyers in all her broad domain, then *de facto* including Michilimackinac, Detroit, Niagara and some other of the territory given by the Definitive Treaty of 1783 to the United States.

So long as the Courts were presided over by lay judges, as was the case (except as to Detroit and its neighbourhood[1]) until 1794, no great difficulty was experienced by suitors, the lay judges were just as little versed in legal technicalities as the ordinary layman, the practice was very simple and without complications and there was no necessity for lawyers at all. But when in 1794, the former Courts of Common Pleas were abolished and the Court of King's Bench for the Province of Upper Canada was erected[2] with a formal practice, the case was different. Theretofore most litigants could conduct their own cases, although in some instances either one of the two lawyers, John White, the Attorney-General, an English barrister, and Walter Roe, of Detroit, an Englishman who received a licence to practise law in Montreal, was employed; occasionally, too, a non-professional agent or attorney appeared.

Now, however, there was need of men who would devote themselves to the practice of the law and who could afford to master its technicalities. Accordingly the Legislature passed an Act[3] authorizing the Lieutenant-Governor to give a licence to not more than sixteen British subjects to act as "Advocates and

* Editor's Note.—The notes to which the references are given are printed consecutively at the end instead of in footnotes.

Attornies,'' and no others than those so licensed and those otherwise qualified were authorized to receive fees for practising in the Courts. Amongst those so licensed by Lieutenant-Governor John Graves Simcoe was Robert Isaac Dey Gray, who received a licence and was ''sworn in,'' October 22nd, 1794. He became our first Solicitor-General.

He was the son of Major James Gray,[4] a half-pay officer, and his wife Elizabeth Low; and was born about 1772. He came with his father and mother to Canada in 1776, and in 1784 to Gray's Creek near Cornwall. Most of his education he received in Quebec. He entered the office in Cornwall of his cousin, Jacob Farrand, who was practising there as an uncertificated lawyer.[5]

There is no record of how Gray came to be favoured by the Governor; no doubt the virtues of his father as well as his own merits justified the appointment to the Bar.

Simcoe had already in view the appointment of a Solicitor-General, and fixed on Gray on the recommendation of ''the Gentlemen of the Land Department,'' and influenced to some extent by the fact that he had been ''regularly bred to the profession''[6] Simcoe seems to have had a real regard for him: he wrote the Duke of Portland in 1795 that he had made Gray Solicitor-General ''in the hopes that the salary of Solicitor-General however small might have enabled him to perfect his education by attending for two or three years at Westminster Hall, and by these means acquire the habits and character of the English Bar and exemplify these advantages to the King's service in this Province.''[7]

Simcoe appointed him Solicitor-General in the Fall of 1794; but as he was to be paid by the Home Government, the appointment could be only provisional and as ''Acting Solicitor-General''; Simcoe wrote to Portland November 10th, 1794, but it was not until May 9th in the following year that Portland replied approving

the appointment.[8] Unfortunately he did not send the necessary Warrant or Mandamus with the letter of approval and the matter seems to have been forgotten at Westminster.

Even the letter of May 9th, 1795, was not received until after the death of Major Gray. The widow was left in poor circumstances and it was imperative that the son should earn a living for her as well as for himself.[9] Young Gray's proposed study at Westminster had to be given up, and he opened an office in Cornwall.

He was elected Member of the House of Assembly for the Riding of Stormont in the Second Parliament of 1796, and this entitled him to "Wages," 10 shillings per diem.[10]

His salary as Solicitor-General could not be paid to him until he was "sworn in." In those days to enable an officer of the Government to be regularly "sworn in" there must be produced a warrant or mandamus from the King, for it was the King who paid and who appointed, the King acting by his Ministers at Westminster. The mandamus not arriving and Simcoe being about to leave for England, it was determined that Gray should be sworn in on the strength of Portland's letter. Gray was accordingly "sworn in," *quantum valeat,* in July, 1796. The formal mandamus did not arrive until 1797 after Simcoe had gone to England; and when it did arrive it was found to be dated February 6th, 1796. The formal and regular appointment and swearing in as Solicitor-General dates only from March 21st, 1797:[11] but he drew his salary as such from the informal swearing in in July, 1796.

Gray removed to York, the new Capitol, early in 1797, and attended the Session of Parliament at York in the same year. He took with him his negro slave, Dorin Baker, and three of her mulatto children, Simon (his body servant), John (who survived until 1871) and a daughter, and lived in a large white house "north of the Landing" on Market (now Wellington)

Street, just west of the lot on the north-west corner of York and Wellington Streets, long since disappeared.

The Records of this Session of the House of Assembly are lost, but there is extant Gray's report on the legislation during that session originating in that House.[12] It had been made the duty of the Chief Justice to make a report on legislation originating in the Upper House and of the Attorney-General and Solicitor-General in the Lower, but John White, the Attorney-General, was not a member of this Assembly and the Solicitor-General was called upon to perform the duty.[13]

Gray was one of the ten lawyers who met at Wilson's Hotel, July 17th, 1797, to organize the Law Society of Upper Canada. He was the second member, the second called to the Bar, the second Bencher—all in 1797—and the second Treasurer, 1798, 1799, 1800 and part of 1801. He also took an active part in framing the early rules and in particular, he successfully opposed the scheme of the Attorney-General to prevent the same person being both Barrister and Attorney.[14]

In the Second Session of the Second Provincial Parliament, Gray's activities are of record. The Act of 1793 concerning slavery which made all newcomers into the Province, free,[15] was not a popular measure in the country and was passed only at the instance of Simcoe, who loathed slavery and had spoken against it in the Imperial House of Commons. Simcoe obtained leave of absence and went to England in 1796, never to return to the Province. Peter Russell was the Administrator of the Government, a man who was more concerned in his own financial aggrandisement than any social or public question.

Christopher Robinson, a United Empire Loyalist of Virginian descent, who had been returned at the General Election of 1796 for the Riding of Addington and Ontario,[16] introduced a "Bill to enable persons migrating into this Province to bring their negro slaves into the same." This Bill was ardently sup-

ported by many members, and the burden of the defence was cast almost wholly upon the young Solicitor-General. The third reading was carried on a vote of 8 to 4. It went up to the Legislative Council and there received the three months' hoist, and the proposition was never revived.[17] When the history of Second Chambers comes to be written, may this act be accounted to them for righteousness.

Russell the Administrator and his Executive Council were not at all satisfied with the management by Gray in the House of Assembly of the Administration measures: and on the death of Christopher Robinson, asked John White, the Attorney-General, to contest the vacant constituency. White objected to the expense, considerable for those days, which he could ill afford, and the Administrator agreed to pay the election expenses. White offered himself as a candidate for Addington and Ontario, but he was defeated by William Fairfield, who was "introduced to Mr. Speaker as the Knight to represent in Parliament the County of Addington in the room of Christopher Robinson, Esquire, deceased."[18]

An amusing episode occurred during the Session of 1799 which will bear recounting.

The Statutes of 1793 provided for the payment by every Riding to its members in the Assembly of wages of not more than ten shillings per day to be levied by the Quarter Sessions on the householders of the Riding, who were divided into classes according to the assessment, whose rate of taxation varied with the classes: in 1794 two other classes were added: in 1796 a new system was authorized for the next ensuing Quarter Sessions but no further; in 1798 two Assembly Bills failed to become law and the old system was reverted to, whereupon there was immediate question as to the proper classification, &c. The twelve members of the House of Assembly who attended the sittings decided to have their travelling expenses, &c., paid out of the public Provincial funds raised under the authority of the Provincial Parliament; the House accordingly

voted amongst other items properly payable, the sum of £50 "to reimburse twelve members their travelling expenses and during their attendance in Parliament this Session, the new mode of assessment not taking place this year." Russell refused to pay it after he had laid the matter before the Executive Council, and received a unanimous opinion that this was an attempt by one branch of the Legislature alone to divert funds into a different channel from that authorized by the three branches—this could only be done by a new Act. The House next year (1799) passed a new Bill; to this the Council made amendments; the House amended the amendments and the Bill failed to pass, so the attempt at "honest graft" failed.[19]

During this Session occurred the first instance of a practice which has been all too common in our Province, and if in some instances beneficial, has not always wrought good.

Thomas Ward, June 20th, presented at the Bar of the House a petition "praying to be relieved from the hardship to which a strict construction of the sixth clause of the Act for the Better Practice of Law subjects him," *i.e.* the clause requiring service under articles and standing on the books of the Law Society for three years before admission as an attorney or solicitor.

Gray and Timothy Thompson (member for Lennox, Hastings and Northumberland, a magistrate but not a lawyer) were appointed a Committee to deal with the petition; they made their report, June 22nd. They point out the very great importance of the matter to the Law Society and to the Province; the Law Society thought that for the House to make a law to admit anyone a member of the Law Society without its concurrence, "would defeat the beneficent intentions of the Legislature and take from the Society . . . one of its first and most important privileges"; while as there was no certificate of capacity produced, no mode of examination authorized for the House to employ, it "might defeat the intention of the Legislature in

securing for the Province a learned and honourable body to assist their fellow subjects when occasion might require and to support their constitution.'' ''With the greatest deference to the wisdom of the House,'' the Committee ''observe that they do not consider it may operate to the disadvantage of the Petitioner, should this House think proper to refer him to the Law Society . . .'' The Report was unanimously adopted—*O si sic omnia.*[20]

Upon the death in January, 1800, of the Attorney-General, John White, Gray was instructed to take charge of all the papers and documents and to act as Attorney-General until a formal appointment should be made.[21] Gray had aspirations for the permanent appointment,[22] but Lieutenant-Governor Peter Hunter who had arrived in the Summer of 1799 did not think it well to advise his nomination—''Mr. Gray, the Solicitor-General being a very young man, not as yet possessing sufficient professional knowledge.''[23]

In our system of Responsible Government, it must, at all times, be in the power of the Government to obtain a majority in the Lower House, House of Commons or House of Assembly; but in those days there was no Responsible Government, the Lieutenant-Governor actually governed and cared nothing for the majority in the House. This independent position he held because the expenses of his government, &c., were paid by the Mother Country, and he had no need to ask for a vote from the Assembly.[24] At the present time the test of the strength of the parties is often made by the vote for the Speaker. As indicating the difference between now and then it may be noted that at the meeting of the House in 1800, the Speaker David William Smith being absent in England, it was necessary to elect a Speaker, and Mr. Street was chosen despite the vote of the Solicitor-General against him.[25]

In this year, 1800, there was a redivision of the Province into Ridings: and Gray was elected for Stormont and Russell.

His candidate for the Speakership in 1801, Mr. Justice Allcock, was defeated by a vote of 10 to 3, and David William Smith again became Speaker—Parliament was congratulated on the Union of Great Britain and Ireland.[26] In this year was passed the first Prohibition Act in Upper Canada—three missionaries of the "Episcopal Church of Unitas Fratrum or United Brethren" *i.e.* the Moravians, at Fairfield, an Indian Moravian Town on the Thames, petitioned that liquor should not be given or sold in the Reserve to the "believing Indians"; and an Act was passed of an even more drastic character forbidding the sale or barter of liquor within the Township of Orford to anyone, as this was considered "necessary for the comfort of the Moravian Indians inhabiting . . . the township of Orford."[27]

In 1802, the question of the fees of lawyers was warmly debated: Gray stuck by his profession and nothing came of the agitation, the Bill for regulating the fees receiving the three months' hoist.[28]

In 1803 Smith was again absent in England. Gray became a candidate for the Speakership but was defeated as were three of his choice, and Richard Beasley was elected Speaker.[29]

This Session was characterized by a foolish dispute between the Houses in which Gray steadfastly took the side of privilege.

A very curious and, from a legal point of view, interesting proceeding also took place in 1803—Gray, with the Chief Justice, Elmsley and William Cooper, owner of Cooper's Wharf (about the foot of Church Street) had made four "fines" of lands—this was a peculiar form of conveyance, it had some advantages but it was based upon a number of "legal fictions," complicated and what we should now call absurd. An old statute of 1403 required fines before they be "drawn out of the Common Bench by the Chyrographer" to be "inrolled in a Roll . . . to remain in the safe custody of the Chief Clerk of the Common Bench."[30] There was no such office or Roll in the Province and Gray petitioned

the Legislature to pass "a law to declare such fines legal and effectual to all intents and purposes." A Bill for the purpose passed both Houses but Hunter (probably on the advice of Chief Justice Allcock) reserved the Bill for His Majesty's pleasure and it never became law. Thus our conveyancing was relieved of a cumbrous and antiquated form—and the simpler forms have always been used instead.[31]

In 1804, Gray was absent from the House in the early part of the Session: but toward the end of February he made his appearance and took the usual active part in its proceedings—this was fated to be his last Session. The story of his untimely death with its singular features has often been told: and it will be here repeated once more.

At this time, the townships on the northern shore of Lake Ontario, from Toronto Bay to the River Trent, now rich, populous and well cultivated, were almost in a state of nature, the primeval forest untouched except in a few places.

There were, indeed, a few white settlers, some of United Empire Loyalist stock who had left their American homes to live and die under the Old Flag, some Americans brought in by Asa Danforth who had built what was called a road—the "Danforth Road" still existing in many places—from York eastward to near Kingston, some Americans attracted by the offer of free land, some retired officers and discharged men of the British Army and Navy, some from Britain seeking for themselves and their children a life of independence and comfort denied them in the Homeland, some "United Irishmen" fleeing the "tyranny of the Saxon" and some who left Ireland in disgust and alarm at the United Irishmen and their movement.

But the Indian roamed at will through all this land, although his territory was considered to be bounded by an ill-defined line a score or so of miles north from the shore of the Lake. He would hunt and fish in this white man's land as well as come there to trade his furs for blankets, firearms, ammunition and rum—one

being considered as real a necessity as another. Often, however, the white fur trader found it advantageous himself to take his merchandise into the Indian territory—he thereby obtained choicer furs and at a cheaper rate.

In the first years of the 19th century, two brothers by the name of Farewell came from the new Republic to Canada, paddled round the head of Lake Ontario and at length reached what is now Port Whitby—and there they established a trading post for furs. They made periodical trips back into the Indian country, and became well known to the tribes in that part of Upper Canada.

In the year 1804 they made one of these trading trips taking with them their hired man, John Sharp; they pitched their camp at Ball Point on Walpole Island in Lake Scugog.

One day the brothers went some distance from their tent on a trading excursion, leaving Sharp behind to guard the camp. On their return they found their servant murdered, his head having been smashed in with a heavy club.

The deed had plainly been committed by an Indian; the Farewells trailed the murderer with his band southward, and aided by information as to the boasts of a well-known Indian, Ogetonicut, one of the Muskrat branch of the Chippewas, succeeded in tracing him to the Peninsula of East York—now Hiawatha Island in the Harbour of Toronto (nearly half a century later, i.e. in February, 1853, the storms of Lake Ontario broke through the neck of the Peninsula and, forming the "Eastern Gap," gave to Toronto its favourite "Island").

It was known that the brother of Ogetonicut, an Indian by the name of Whistling Duck, had been killed the previous year by a white man, and that Ogetonicut had openly threatened revenge. The Lieutenant-Governor of the Province, General Hunter, had promised that Cosens, the slayer of Whistling Duck, should be punished; but it had been found impossible to appre-

hend him; and Ogetonicut determined on vicarious vengeance for his brother's death by killing some other white man. Ogetonicut after the death of Sharp, had been heard to boast of having successfully avenged his brother and had been showing by signs and physical actions, how he had broken a white man's skull.

The whole Muskrat tribe was camped on the Peninsula; but after some demur, the Chief delivered Ogetonicut up to the officers of the law, and the Indian was lodged in the gaol of the Home District for trial.

In the preparation of the prosecution, it appeared doubtful whether the *locus* of the crime was in reality within the Home District, and a survey was ordered to make this certain—the survey disclosed that the place was a few rods east of the boundary between the Home and the Newcastle Districts and within the latter. The English Criminal Law in force in Upper Canada did not permit the trial in one District of a person accused of murder in another. It, therefore, became necessary to have Ogetonicut's trial in the Newcastle District. The "County Town" of that District was then on Presqu'isle Point, a peninsula stretching out into Lake Ontario south of the County of Northumberland. The town, Newcastle, was on the north or Bay side of this peninsula and was a place of some importance, having a court house and gaol, a good anchorage and harbour, a shipyard and several stores and dwelling houses. Now only the remains of a few foundations show that such a place ever existed.

In those days while the "Danforth Road" ran from York eastward and it was passable for horse and rider, much of it was difficult and no part attractive.[32] Coach traffic was as yet unknown and most of the traffic, passenger or goods, was by the Lake in canoe, whale boat or schooner.

The Provincial Government had its own marine, which was utilized for carrying the mail, &c., and the schooner "Speedy" (Captain Thomas Paxton) was detailed to convey the prisoner to Newcastle.

Captain Paxton objected to making the voyage, about 100 miles—he reported, as the fact undoubtedly was, that the schooner was not seaworthy; his objections were overborne and he received peremptory orders to sail.

In the schooner also embarked the Assize Judge, Mr. Justice Thomas Cochran, Puisne Judge of the Court of King's Bench.[33] In the Fall of 1803 he presided at the Assizes at Newcastle; and in the Fall of 1804 he was again assigned for the same duty.[34]

With the Judge went the Solicitor-General as Crown Prosecutor.[35]

Gray had arranged with Weekes, another barrister, an old "United Irishman" and student of Aaron Burr's,[36] to ride together to Newcastle on horseback; but yielded to the Judge's request to accompany him; Weekes was, fortunately for him, not included in the invitation and rode alone to the distant Assize town. Gray was accompanied by his coloured body servant, Simon Baker.[37]

With Mr. Justice Cochran, too, sailed Angus Macdonell, another member of the Bar of Upper Canada, one of a clan that has furnished and continues to furnish many members for the service of the Empire—he had been Clerk of the Legislative Assembly of the Province during the First and Second Parliaments and was at this time a member of the same House in the Third Parliament.[38] He had a large practice as barrister and attorney, his name appearing very often in the Term Books—he was to defend the Indian. There were also Mr. Fisk (the High Bailiff of York), two Indian interpreters, Cowan and Ruggles, Mr. Herchimer, a York merchant, and several witnesses—in all, with captain and crew, thirty-nine persons. The ill-fated "Speedy" set sail October 7th, 1804, the weather being even then stormy; the storm increased, the schooner was sighted the following day opposite what is now Lakeport, about 90 miles east of Toronto, but was never seen again. Judge, counsel, constable, prisoner, witnesses, interpreters, merchant, captain and

crew were all engulfed in the angry waters—and not even a spar of the schooner ever again came to mortal ken. A single hencoop came ashore which was supposed by some to have belonged to the unfortunate vessel, but even that is doubtful.[39]

Gray's views as to slavery may perhaps be indicated by his will whereby he set free his "black woman servant, Dorinda, . . . and all her children" and made provision for their support; he specially remembered her two sons, Simon and John Baker, in somewhat generous bequests.[40]

[1] In the District of Hesse (Western District) William Dummer Powell a lawyer was the "First" and only Judge; in all the three other Districts, the Judges, three in each, were laymen.

[2] By the Act (1794) 34 Geo. III. c. 2 (U.C.).

[3] (1794) 34 Geo. III. c. 4 (U.C.).

[4] James Gray was a Scotsman who had been an Ensign in Lord Loudon's Regiment in 1745, then a Captain in the 42nd (the famous Black Watch) until after the capture of Havana by Pocock and Albermarle in 1762. He sold out his commission in 1763, and came to the Continent of North America, where he married Elizabeth, the daughter of John Low, of Newark, New Jersey. In the troublous times of 1776, he came with his wife and son together with the household slave Dorin, to Canada; he received a Commission as Major in the first battalion of Sir John Johnson's "King's Royal Regiment of New York," and at once went into active service, his wife and family living in Montreal or Sorel. Shortly after the declaration of Peace and the Definitive Treaty of 1783, the Regiment broke up (1784) and he came with his wife and household to what was still then part of the Province of Quebec, now in Ontario. He settled at Gray's Creek some three miles east of Cornwall; he was made a J.P. by Dorchester in 1788, and his Commission of the Peace was renewed by Simcoe in 1793; his attendance at the Quarter Sessions is of record. Gray became Colonel in the Militia of Upper Canada; he died May 17, 1875—which changed the career of his son.

See Pringle's "Lunenburgh," Cornwall, 1880, pp. 49, 51, 173, 180, 318, 319-321. There are many references to James Gray in the Haldimand papers and the Q. Series, Can. Arch.

The will of James Gray, dated Feb. 7, 1788, still of record, appoints Isaac Ogden, Clerk of the Crown at Quebec, who was Robert's godfather, to be his guardian during infancy; but the father survived the son's nonage. Ogden, Col. Campbell, Superintendent in the Indian Department, John Lilly, Merchant, and Charles Blake, Surgeon of Montreal, the executors named in the will all refused to act, and Robert was granted administration with will annexed, October 10, 1796

[5] Jacob Farrand was one of those who afterwards received a Licence to practise under the Act (1794) 34 Geo. III. c. 4 (U.C.); he was sworn in four days after his cousin Gray, *i.e.*, October 26, 1794.

[6] Simcoe's letter to the Duke of Portland from Niagara, November 10, 1794, Can. Arch., Q. 281, I. p. 23; Simcoe adds: "He is the son of Captain Gray on half-pay, a Colonel of Militia, a worthy example of loyalty."

[7] Simcoe's letter to Portland from Navy Hall, November 9, 1795: Can Arch., Q. 282, I. 29.

[8] Portland's letter to Simcoe from Whitehall, May 9th, 1795, Can. Arch., Q. 281, I. 263; Q. 278, A. 70.

[9] See letter mentioned in note 7, *supra*.

[10] The blunt word "wages"—not "indemnity" is used in the Statute (1793) 33 Geo. III. c. 3 (U.C.). Gray's election address is worthy of reproduction: Pringle's "Lunenburgh." p. 258.

"To the free and independent electors of the townships of Cornwall and Osnabruck, and of the County of Stormont.

Gentlemen:—"Actuated from an ardent inclination of devoting myself to your particular service, and earnestly wishing to become instrumental in promoting your welfare, by being classed among those who are to represent this country in its second Provincial Parliament, I humbly offer myself a candidate for your suffrages at the approaching election for the County of Stormont .

"And I beg leave to assure you that should I be so fortunate as to have the honour of becoming your representative I shall endeavour faithfully to acquit myself in that important duty, by my zealous exertions to support your rights and promote your interests; and rest assured further, that it shall ever be my greatest ambition to manifest to you on all occasions, the same readiness and zeal to serve you which the greater part of you have uniformly experienced during a course of many years, from your late friend and benefactor; and it will afford me a source of the greatest consolation and happiness, if from my earnest endeavours I shall hereafter prove myself deserving of your confidence.

"I have the honour to be, gentlemen,

"Your most devoted and most faithful servant,

"R. I. D. Gray."

[11] See Gray's Memorial to Russell, Niagara, July 17th, 1797; he asks a year's salary lost by this postdating of his mandamus, but Russell was powerless. Can. Arch., Q. 283, 252. He took the oaths, March 14th, 1797, Can. Arch., Q. 285, 129.

[12] Can. Arch. Q., 284, 53-58. Gray's comments are sensible and moderate.

[13] At a meeting of the Executive Council at Newark, August 28, 1797, it was made the official duty of the Chief Justice to provide copies of all Acts of Parliament to be sent to the Secretary of State and within one month of the end of the Session to give in writing the grounds and reasons of those originating in the Upper House and of the Attorney and Solicitor-General of those in the Lower House. Can. Arch., Q. 285, 210.

[14] See my "Legal Profession, &c.," pp. 11, 12, 13, 154-6. When her son left Cornwall the widow went to reside with Captain Joseph Anderson, whose wife Hannah (Farrand) was the daughter of her sister Margaret (Low) and Dr. Farrand; she died in 1800.

[15] (1793) 33 Geo. III. c. 7 (U.C.)—a full account is given of the circumstances of the passing of this Act and some of its consequences in my work, "The Slave in Canada." Washington, D.C., 1920, pp. 553 *sqq.*

[16] The present County of Ontario was then an uninhabited wilderness; the County of Ontario at that time consisted of the Upper Canadian Islands in the St Lawrence. Christopher Robinson was the father of Sir John Beverley Robinson and the grandfather of Christopher Robinson, Q.C., of our own time—he was also a lawyer, by what right does not seem certain. He took part in organizing the Law Society of Upper Canada, July 17th, 1787, at Newark, was then called to the Bar and became a Bencher. He removed to York from Kingston in 1798 and died within three weeks after his arrival, November 2.

[17] See my "The Slave in Canada," pp. 59, 60.

[18] The official record: 6 Ont. Arch. Rep. (1909) p. 98, under date June 12, 1799—the Speaker was Mr. (afterwards Sir) David William Smith.

The letter of Administrator Russell to the Duke of Portland, June 1st, 1799, Can. Arch., Q. 287, I. I., is worth transcribing in full:—"Having long felt and lamented the want of the Attorney-General's abilities in the House of Assembly, the Members of which are in general ignorant of Parliamentary Forms and Business and some of them wild young men who frequently require some person of respectability and experience to

keep them in order, I requested that Gentleman to stand Candidate for the Representative of the Counties of Addington and Ontario which had been vacated by death; and I promised to defray the expenses of his election which I well knew the smallness of his income might render inconvenient to himself.

But I am sorry I have to report to Your Excellency that the low ignorance of the electors has defeated my wish by preferring an illiterate young man of their own neighbourhood. I have, however, directed my Secretary to pay Mr. White's expenses, agreeable to my promise, and to charge the amount, £23. 10. 3, Provincial Currency, as a contingency in the Lieutenant-Governor's office which I humbly pray may receive your Excellency's approbation." There does not seem to have been express approval, but there was no disapproval; and the Mother Country paid the election expenses, about $100, of a defeated candidate in Upper Canada.

[19] See the Acts (1793), 33 Geo. III. c. 3 (U.C.); (1794), 34 Geo. III. c. 6 (U.C.); (1795), 35 Geo. III. c. 7 (U.C.); and the proceedings of the House and Council for 1798 and 1799, 6 Ont. Arch. Rep. (1909) and 7 Ont. Arch. Rep. (1910).

Of the sixteen Members of the House of Assembly there were in addition to the Speaker David Willam Smith, who was paid a fixed salary of £200, twelve in attendance during this session, and it was their expenses which were to be paid: David McGregor Rogers, Richard Beasley, Robert Isaac Dey Grey, Thomas Fraser, Dr. Solomon Jones, Samuel Street, John Macdonell, Edward Jessup, Christopher Robinson, Benjamin Hardison, John Cornwall, Richard Wilkinson.—12. Absent—Timothy Thompson, Thomas Smith and Thomas McKee, 3, making up the full number to 16, including the Speaker

See the proceedings in the House of Assembly for 1799: 6 Ont. Arch. Rep. (1909) 107, 110, 112.

[20] It is satisfactory to know that Ward applied regularly to the Law Society and was admitted (No. 32) on the books of the Society—he became a Barrister in Hilary Term, 1808 (No. 33), a Bencher in 1820 (No. 29) and had a very long career in the Newcastle District. Before becoming a Barrister, Ward was admitted to practise as an Attorney. No regular or other entry of his admission on the books of the Law Society was made at the time; but April 6th, 1803, the Society noticed that though he had been admitted as Attorney, no entry had been made of his admission to the Law Society; accordingly while he was acknowledged as an Attorney he had to wait five years more for his Call

See my "Legal Profession, &c.," pp. 141, 171.

[21] Letter Chief Justice Elmsley from York, January 8th, 1800, Can. Arch. Q. 287, 1, 104.

[22] Every other Solicitor-General of Upper Canada became Attorney-General on a vacancy—D'Arcy Boulton, John Beverley Robinson, Henry John Boulton, Christopher Alexander Hagerman, William Henry Draper and Robert Baldwin—Gray was the single exception.

[23] Letter Hunter to the Duke of Portland from Quebec, February 10th, 1800: Can. Arch. Q. 271, 1, 106.

The letter continues "and there being no person in either of the Canadas who I could recommend as well qualified to fill that station, I must, therefore, urge on Your Excellency sending out as soon as possible a gentleman sufficiently qualified in all respects to fill that important office."

Accordingly Thomas Scott of Lincoln's Inn, afterwards Chief Justice of Upper Canada, was appointed Attorney-General. See Can. Arch. Q. 278, A. 209.

[24] This continued until 1816.

[25] 6 Ont. Arch. Rep. (1909), pp. 127, 128.

[26] At the present time it may be worth while to see how the Union was then considered in Canada. Lieutenant-Governor Hunter in the speech from the Throne, said:—

"It is with the sincerest pleasure that I announce to you an event of the utmost importance which has lately taken place in Europe, I mean

the Union of the Kingdoms of Great Britain and Ireland. The British Nations are now entirely consolidated and all that seemed wanting to make them all that they are capable of being is attained. Everything that was partial, everything that was local, everything that could recall the recollection that those whom nature intended to be one were distinct is done away and the most intimate union is established on the justest and most liberal principles. Our strength is increased by being brought to a centre; our resources are enlarged by the unreserved communication of every advantage. Nor is to be doubted that under the auspices of the August and enlightened Prince whose wisdom projected and whose perseverance has accomplished this great event, effects the most beneficial will soon be felt which after diffusing wealth and power and happiness over the now United Kingdoms will gradually spread themselves through the remotest branches of the Empire."

The House loyally answered:

"And we truly rejoice with Your Excellency in the happy issue of His Majesty's paternal endeavour for concentrating the energy of his Empire by the late Act of the Union which has cemented into one his Kingdom of Great Britain and Ireland."

[27] (1801) 41 George III. c. 8.

[28] 6 Ont. Arch. Rep. (1909) pp. 260, 296, 306.

[29] 6 Ont. Arch. Rep. (1909) pp. 323, 324, 325.

[30] This Statute is (1403), 5 Henry IV. c. 14—all the learning on the subject is to be found in Blackstone's Commentaries, Book II., pp. 118, 349. *sqq.*

[31] 6 Ont. Arch. Rep. (1909), pp. 380, 383, 385, 388, 409.

[32] The well-known lines concerning the Highland Road:

"Had you seen this road before it was made,
You would lift both your hands and bless General Wade,"

were parodied by an Upper Canadian:

"If you saw this road just as it ran forth
You would lift both your hands and curse old Asa Danforth."

[33] He was the son of the Hon. Thomas Cochran, at one time Speaker of the House of Assembly, Nova Scotia, and afterwards a member of the Council of that Province. The future Judge was educated for the English Bar and received his call at Lincoln's Inn. He was made Chief Justice of Prince Edward Island in 1801, before he was thirty; and in 1803 was appointed to the Upper Canada Bench.

Gray has had experience of this Danforth Road the previous summer, as is shown by the following extract from Pringle's "Lunenburgh," page 105: "A letter dated at Kingston on the 17th June, 1804, written by Robert I. D. Gray to a relative at Cornwall, gives an account of his journey from Cornwall to Kingston on the way to York. He says: 'I came here to dinner on Friday, very well but tired. Shaver's horses brought me to Howard's or rather five miles this side, to one Clowe's, whose horses brought me to Gananoque. I had a comfortable breakfast from Colonel Stone, and with a fine wind sailed to Kingston. The accounts of the road to York and the impracticability of getting regular conveyances delays me here. Had I left Cornwall on Tuesday I would now have been at York, as a vessel sailed a little before I arrived here.'"

[34] We adopted the English system of trial of civil actions before Courts of Assize and Nisi Prius in 1794, and have ever since retained it—before that time there was a Court of Common Pleas with full civil jurisdiction in each District. The system of trying criminal cases at Courts of Oyer and Terminer and General Gaol Delivery which had been in vogue from the Conquest of Canada by Great Britain was continued, so that, as in England, the Judge went to the Sittings with five Commissions

The Civil side was not very heavy; land was not yet of much value, and the chief actions were on merchants' accounts and actions for assault and battery. These last like most of the criminal cases had their origin in whiskey, then very cheap and abundant; the Canadian whiskey of the time made up for its cheapness by its strength—as sold it was often

quite as strong as Scotch whiskey when first distilled and 70 per cent. was no unusual amount of alcohol. It was not ripened but was sold raw with all the fusel oil, etc., as it came from the still.

Moreover, in those days, Paul's advice to Timothy was interpreted most liberally, wine not being available, *le vin du pays* (which has always been whiskey) was used—and it was considered a universal specific on all occasions. Convivialism was the regular thing, and for half a century after the creation of Upper Canada, its people were, perhaps, the most drunken in the world. Now we have Prohibition.

[36] Afterwards killed in a duel at Fort Niagara by a brother barrister, William Dickson.

[37] A story is told in a letter from Gray which is most creditable to his heart and at the same time gives us an insight into the state of the slave at this time. I have inserted the following note in my "The Slave in Canada," p. 61.

"In the Canadian Archives M. 393, is the copy of a letter, the property of the late Judge Pringle, of Cornwall, by Robert I. D. Gray to his sister, Mrs. Valentine, dated at Kempton, February 16th, 1804, and addressed to her at Captain Joseph Anderson's, Cornwall, Eastern District; speaking of a trip to Albany, New York, he says:

"I saw some of our old friends while in the States, none was I more happy to meet than Lavine, Dorin's mother. Just as I was leaving Albany I heard from our cousin, Mrs. Garret Stadts, who is living in Albany in obscurity and indigence owing to her husband being a drunken idle fellow, that Lavine was living in a tavern with a man of the name of Broomly. I immediately employed a friend of mine, Mr. Ramsay, of Albany, to negotiate with the man for the purchase of her. He did so, stating that I wished to buy her freedom, in consequence of which the man readily complied with my wishes, and although he declared she was worth to him £100 (i.e., $250) he gave her to me for 50 dollars. When I saw her she was overjoyed and appeared as happy as any person could be, at the idea of seeing her child Dorin, and her children once more, with whom if Dorin wishes it, she will willingly spend the remainder of her days. I could not avoid doing this act, the opportunity seemed to have been thrown in my way by Providence, and I could not resist it. She is a good servant yet, healthy and strong and among you you may find her useful. I have promised her, that she may work as much or as little as she pleases while she lives—but from the character I have of her, idleness is not her pleasure. I could not bring her with me, she wanted to see some of her children before she sets out: I have paved the way for her, and some time this month, Forsyth, upon her arrival here, will forward her to you. . . ." Then follows a pathetic touch:

"I saw old Cato, Lavine's father, at Newark, while I was at Col. Ogden's; he is living with Mrs. Governeur—is well taken care of and blind—poor fellow came to *feel* me for he could not see, he asked affectionately after the family."

[38] Macdonell had not been well treated by the Government and he took a somewhat active part in the House of Assembly, generally on the other side from the Solicitor-General—there was not yet anything like an organized "Opposition." He deserves to be remembered on account of a petition he presented to the House—it read:

"The petition of Angus Macdonell, Esquire, for leave to bring in a Bill to change the name of York into that of Toronto was read as follows:—

"To the Honourable the Commons of Upper Canada in Parliament assembled.

"The petition of Angus Macdonell,

"Humbly sheweth:

"That the name of Toronto by which the Town, Township and County (now called York) were formerly distinguished, being more familiar and agreeable to the inhabitants of the said Town, Township and County than that of York, your petitioner prays that he may have the leave of this Honourable House to bring in a Bill for restoring the former name of Toronto to the said Town, Township and County.

"And your petitioner as in duty bound, will ever pray .

"York, 18th February, 1804 (Signed) A. MACDONELL."

Leave was given to bring in a Bill for that purpose, but nothing was done and our city continued to be Muddy Little York until 1834, when the Act (1834) 4 William IV. c. 23, was passed " to extend the limits of the Town of York, to erect the said town into a city and to incorporate it under the name of the City of Toronto."

[39] At that time and for more than a score of years afterwards the Attorney-General and the Solicitor-General claimed and exercised a monopoly of criminal prosecution in the Courts of Oyer and Terminer and General Goal Delivery; and they benefited by the fees which though absurdly small in our modern conception, were far from negligible in those primitive days of cheapness and economy.

[40] This will is of record at Osgoode Hall—letters of probate were granted to Alexander Macdonell in 1804, the will reads:

In the name of God Amen.

I, Robert Isaac Dey Gray, Esquire, of York, in the Province of Upper Canada, being of sound mind, memory and understanding and knowing the uncertainty of human life and instability of earthly affairs, do make, publish and declare this to be my last will and testament.

In the first place my will is that I be buried (if circumstances will permit) in the place which my father and mother are buried in Cornwall.

Secondly.—It is my will that all my just debts may be paid as soon as possible after my decease—and for this purpose charge all my real and personal estate and I hereby give my executor full power and authority to sell and dispose of, so much of the same, by bargain and sale or otherwise as may be sufficient to discharge all my said debts.

Thirdly.—I feel it a duty incumbent upon me in consequence of the long and faithful services of Dorinda my black woman servant tendered to my family, to release, manumit, and discharge her from the state of slavery in which she now is and to give her and all her children their freedom. My will, therefore, is, that she be released, and I hereby accordingly release, manumit, and discharge the said Dorinda, and all and every of her said children both male and female from slavery and declare them and every of them to be free.

Fourthly.—And in order that provision may be made for the support of the said Dorinda and her children, and that she may not want after my decease—my will is and I hereby empower my executor, out of my real estate to raise the sum of twelve hundred pounds currency, and place the same in some solvent and secure funds—and the interest arising from the same I gave and bequeath to the said Dorinda, her heirs and assigns for ever—to be paid annually.

Fifthly.—In token of my love and affection for my two cousins, Mrs. Catharine Valentine, and Mrs. Johanna Anderson, wife of Joseph Anderson, Esquire, of Cornwall, I give them and each of them the sum of two hundred and fifty pounds

Sixthly.—In token of my gratitude to the Honourable Isaac Ogden, Esquire, now of Montreal, in Lower Canada, and his family, I give and devise to Miss Mary Ogden, his daughter, one thousand acres of land that is to say, lots No. 19, 21, 18, 17 and 15 in the sixth concession of the township of Hope—to her and her heirs for ever.

In token of my regard and esteem for the Honourable John Elmsley and Mrs Elmsley, his wife, I give and bequeath to him twenty pounds which I respectfully beg of him to make such use of as he may like but as a remembrance of my gratitude for their attention to me

I leave all my wearing apparel to my servant, Simon, and also my silver watch. And I give and devise to him and his heirs for ever two hundred acres of land, that is to say, lot No. 11 in the first concession of Whitby.

I also give and devise to John, my other black servant and his heirs for ever, two hundred acres of land, that is to say, lot No. 17, in the second concession of Whitby. I also give Simon and John fifty pounds each. The remainder of my real and personal estate I divide equally between my two cousins, Catharine Valentine and Johanna Anderson, to hold to them and their heirs for ever, with the following exceptions:—

To Sheriff McDonell I give, devise and bequeath my hundred acre lot above the Garrison, being that I got from his brother and is number 28, in first concession of York.

And I appoint him, the said Sheriff McDonell, to be my executor, which trouble I request him to take for me. And give him full power to sell and dispose of the landed property I have for the purpose of carrying into effect this my will.

In witness whereof I have hereunto set my hand and seal this twenty-seventh day of August, 1803.

(Signed) Robt. I. D. Gray.

Signed, sealed and published in our presence who signed this in the presence of the testator and each other.

(Signed) Alex. McDonell.
Thos. Paxton.
J. Macdonell.

Dorinda was the daughter of the female slave, Lavine, who was the daughter of a native African slave, Cato; Dorinda, married a "Dutchman" (*i.e.*, German) Simon Baker, and had a large family at Gray's Creek. While the father was free the children followed the status of the mother, *sequitur ventrem* in the legal terminology.

"Sheriff McDonell" was Alexander Macdonell, Sheriff of the Home District.

The kinship of Mrs. Valentine and Mrs. Anderson will appear from the following family tree. "Johanna" and "Hanna" were considered synonymous like "Elizabeth" and "Eliza," etc.

John Low

Margaret Low—Dr. Farrand — James Gray—Elizabeth Low

Robert Isaac Dey Grey

Hannah Farrand—Joseph Anderson

Jacob Farrand — John Valentine—Catherine Farrand

(Joseph Anderson and his wife Hannah (or Johanna) were the maternal grandfather and grandmother of the late Judge Pringle, of Cornwall). Isaac Ogden is not to be confused with C. R. Ogden, later Solicitor-General and Attorney-General of Lower Canada.

John Elmsley was Chief Justice of Upper Canada, 1796-1802, and of the King's Bench, Quebec, 1802-1806; he was a warm friend of Gray's. The "pounds" mentioned are "pounds" in Provincial Currency at this time worth 9/10 of pounds sterling.

The unfortunate Simon Baker died with his Master. John survived until 1871, the last of all who had been slaves in Canada. He entered the service of William Dummer Powell; when he got drunk he enlisted and his master bought him off seven times. After warning he enlisted the eighth time and was allowed to remain a soldier. He went with the Regiment to New Brunswick; later he re enlisted and fought in the War of 1812, and then at Waterloo. He received a pension in his later years, which he spent at Cornwall—a well-known character of the town he died in 1871, age about 98. Apparently he received little benefit from Gray's generous bequests. See Pringle's "Lunenburgh," pp. 318-325.

EARLY PROPOSALS FOR A COURT OF CHANCERY IN UPPER CANADA

By William Renwick Riddell, LL.D., F.R.S. (Can.)
Justice of Supreme Court of Ontario.

For some months the Province of Upper Canada was under the "Canadian" law, substantially the Coutume de Paris; this, of course, was based upon the Civil Law, and there was no need of a Court of Equity "to abate the rigour of the Common Law."[1]

The first Act of her first Parliament introduced the Laws of England in all matters of controversy "relative to property and civil rights."[2]

This was rightly construed as putting an end to all Equitable jurisdiction in the existing Courts[3]. When in 1794 the Court of King's Bench was created by Statute it did not receive any powers beyond those of the Common Law Courts in England[4].

In England it had been found absolutely necessary to have a Court of Equity, but the Colonial Legislature did not create such a Court—this is the more to be wondered at as Chief Justice Osgoode who drew the Judicature Act of 1794 was himself an expert Chancery practitioner[5]. The omission might have been rectified had Osgoode remained in the Province, but he left for his new position as Chief Justice in Lower Canada a few days after the Session of 1794.

There was some thought of erecting such a Court during the Chief Justiceship of Osgoode's successor, John Elmsley. Elmsley had recommended the appointment of Henry Allcock as a puisne justice of the King's Bench to complete the quota of Judges of that Court[6]: Allcock apparently heard some rumour or suggestion in England that a Court of Equity was contemplated with a judge called Master of the Rolls.[7] Allcock always contended, and probably with truth, that when he accepted the position of puisne, it was on the understanding that he would succeed to the first vacant Chief Justiceship in Upper Canada, or in

Lower Canada if Elmsley preferred to remain in Upper Canada;[8] but there is nothing to indicate that he had any promise of the position of a Judge in Equity.

Allcock was sworn in as Justice of the King's Bench in November, 1798; General Peter Hunter, the second Lieutenant-Governor of the Province, arrived the following August, and almost at once Allcock was taken into the confidence of Hunter and so remained until Hunter's death[9].

From Hunter's arrival in the Province, applications were made to him from time to time for the erection of a Court of Equity, chiefly by merchants who had taken mortgages for debts due to them and who desired to foreclose. A Court was desired to enforce specific performance of contracts for the sale of land, for the administration of intestate estates, the care of infants, etc.[10] It is almost certain that it was the influence of Allcock which caused Hunter to interest himself in the project of a Court of Equity for the Province.

We find an official despatch to the Secretary of State in which he says: "From my arrival here down to the present time, constant applications have been made to me for the establishing of a Court of Equity and the necessity for such a Jurisdiction is now become so urgent that it cannot longer be delayed without manifest Injury to the Province.

The Merchants and others both here and in the Lower Province have made application for a Court of Equity, stating that they have considerable sums of money due to them upon Mortgages of Lands in this Province, and the Debtors knowing that there is no Jurisdiction in which these mortgages can be foreclosed avail themselves of that circumstance and will not pay those debts or take any other step that Justice requires.

Representations are also made to me of a great number of cases in which agreements have been entered into for the Sale of Lands in which in some of the cases

the purchasers, and in others the sellers, are unwilling to perform their agreements and the want of a Jurisdiction in which these Contracts can be enforced is much felt. . . There are also many instances of people being totally unable to recover their share of the Effects of Relations who are dead without Will, and great difficulties begin to arise upon Questions on Wills made here by illiterate people, and there are cases also in which Executors are unable to proceed in their Executorship for want of such a Court.

It has also been represented to me that Infant Children have been very much injured after the Death of their Father, by a Second Marriage of the Mother, for want of the Protector which a Court of this kind would afford them. To these general classes of cases I have to state to Your Grace that many other are daily occurring in which the parties by mistake apply to the Court of King's Bench here for Relief and receive answer from that Court that it cannot interfere, and that their Rights can only be discussed before an Equitable Tribunal.'"[11]

Hunter, probably at Allcock's instance, directed him to draw up a Bill for the erection of a Court of Chancery.

At that time, and for several decades thereafter, the High Prerogative view prevailed that by the delivery of the Great Seal of the Province to the Lieutenant-Governor, he became *ipso facto* Keeper of the Great Seal for the Province, and that the Statute of 1562, 4 Elizabeth, c. 18, gave him the powers of a Chancellor.

Upon that theory, "it is well known that in the British West India Islands, and some other ancient British possessions, there were Courts of Equity exercising their authority on no other foundation than that the Governor was by Common Law, Chancellor in virtue of his custody of the Great Seal.[12] The Governor of Nova Scotia and of the former Province of Quebec had exercised this jurisdiction on that foundation.

There consequently seemed no reason for calling upon the Legislature to act—except one and that, most

potent. Hunter was a soldier and not a lawyer: he could not himself master the lore of Equity, and it was therefore necessary to have a competent person in the Court. There was, however, no provision by the Home Administration for the payment of a salary to such a person, and the Province had not yet assumed the burden of paying the Judges. It was proposed that a Court of Chancery should be established for the Province with the Lieutenant-Governor as Chancellor, with the same powers as the Lord Chancellor or Lord Keeper, and a Judge to act for him in his absence, with the title of Master of the Rolls.

A Bill for that purpose was drawn up by Allcock —it is an admirable piece of draftsmanship, a model in every way, and there can be no doubt that such an Act would have been satisfactory.[13] It was hopeless to expect the Province to pay the cost of such a Court— it was still pap-fed by Britain and duly ungrateful. Hunter wrote to Portland with the draft Bill and explained the necessity for it — he admitted that his instructions[14] allowed him to establish a Court of Equity without the aid of the Legislature, but pointed out that there was a total lack of officers for such a Court, and that it would be absolutely impracticable "without the aid of a Professional Gentleman educated and brought up at the Chancery Bar at home"—he pointed out "as to the Bar after excepting one, the Attorney-General (Thomas Scott) I am sorry to state . . . their knowledge of any branch of the law is very inconsiderable, and as to a Court of Equity, I believe not one of them was ever within the walls of such a jurisdiction." He urged the necessity of such a Court. "His Majesty's subjects are daily complaining, and not without just cause, that for the want of some jurisdiction of the kind there is a failure of justice."[15]

Allcock wrote John King, the Permanent Under Secretary, with whom he and Osgoode before him, were on most friendly and familiar terms, and who seems to have been most influential in Colonial matters—he

asked for "the Performance of the Promise made me when I came to this Country to succeed to the first vacant Chief Justiceship here or in the Lower Province after Mr. Elmsley had taken his choice," and added, "At the desire of His Excellency, the Governor, I have devoted a great part of my time for the last 14 months to the preparation of a Bill and the digesting a plan for the Erection of a Court of Chancery here, and the Governor has done me the honour to say that if it should meet the approbation of His Majesty's Ministers that such a Court should be established upon the plan to be proposed by these papers, it would be for the convenience of the Province that I should continue here in order to assist him in the discharge of the duties of his office as Chancellor."[16]

Lord Hobart, Secretary for War and the Colonies, sent Hunter's despatch to the Lord President of the Council,[17] but March 26, 1802, an Order-in-Council was passed disapproving of the project, as the Governor was already vested with power to settle cases in Equity, and could "call for the assistance of any of His Majesty's judges or law officers of the Province" if such assistance should be required—it was further ordered that the proposed Court should not be constituted "without full consideration." Moreover the Governor could call upon any of the Judges or Law Officers to assist in framing regulations, forms and methods of procedure as well as a table of fees for Chancery.[18] This Order-in-Council was sent by Hobart to Hunter, April 8; and it put an end to all hope of a salary for any Judge acting in Equity, and the old plan would, therefore, have to be resorted to and the Judge, as well as the officers, paid by fees.

Allcock was equal to the occasion—he drew up a Table of Fees "calculated upon the idea that the officers of the Court will not receive any salaries."[19] This table provides fees for the Chancellor as well as the officers of the Court, it being understood that Hunter as Chancellor would turn over his fees to Allcock. Hunter recommended that arrangement in his despatch to Hobart.[20]

As was not unusual at that time and for many years thereafter, the matter was pigeon-holed at Westminster and no answer was forthcoming. Hunter and Allcock waited with what patience they could, and at length the Lieutenant-Governor wrote to Camden,[21] September 15, 1804; he referred to the correspondence of 1801 and 1802, said that the letters had not been answered, and added that Allcock was going to England for information on the subject—that the necessity for such a Court had greatly increased since his despatch to Portland.[22] Allcock, who had become Chief Justice, October, 1802, went to England in the Fall of 1804; and when there he advised with the Home authorities; it was definitely arranged that a Court of Chancery should be established and that the Lieutenant-Governor should call upon Allcock to sit and assist him in the business of the Court. Hunter was officially informed that Allcock would receive full instructions upon this with other Colonial matters requiring decision[23] and everything seemed settled. But Hunter died mysteriously and somewhat suddenly at Quebec, August 21, 1805; and Allcock did not return to duty in Upper Canada. John Elmsley the second Chief Justice of Upper Canada, who had succeeded Osgoode in the Chief Justiceship in Lower Canada, died in July, 1805; and after a short delay, Allcock was appointed to succeed him. This materially improved Allcock's financial position: but he continued to urge the establishment of the Court of Chancery in the Upper Province. There is extant a letter from him to Sir George Shee, Under Secretary for War and Colonies,[24] in which he sets out the inconveniences of the absence of such a Court. "When I sat in the Court of King's Bench there, many verdicts were obtained against Defendants, contrary to the Equity of the case, and in which a Court of Law could not afford any Relief, particularly in Ejectment cases[25]—there were many of these cases in which the Decree of a Court of Equity quite as a matter of course, not only (would) have relieved the party from the verdict, but

have arranged many other points in question between the parties and which, because a Court of Law could not interfere, remain to this moment undecided to the serious Injury of one of the parties and of consequence in failure of Justice.''[26]

The letter was referred to W. Harrison (afterwards K.C.), Standing Counsel to the Department; and he expressed astonishment that a Court of Chancery had not been established in the Province at the time of the introduction of the English Laws, as it is ''a most essential part of our establishment and many cases of hardship and instances of failure of justice must occur until it is established.'' He advised that instructions should be given to the Governor ''to establish such a Court, taking upon himself the office of Chancellor and calling to his assistance either the Chief Justice or any of the Judges[27] to assist him in establishing the regulations of the officers and details of practice, and also to assist him in the hearing of any causes in which he may wish to have their advice.''[28]

In the meantime the notorious Puisne Judge, Thorpe, wrote to his friend Edward Cooke (who had been displaced by Shee the same year and was to succeed him in the following year as Under Secretary for War and the Colonies), saying that the Court was absolutely necessary, without it justice could not be obtained or the King's grant when fraudulently obtained cancelled—he had heard that the establishment was delayed on account of £400 per annum being asked for the Judge, and he offered to undertake it for the sake of public justice without fee or reward.[29]

This offer was not accepted: Sir Francis Gore arrived as Lieutenant-Governor to succeed Hunter in August, 1806, and it was not long before the factious conduct of Thorpe made it impossible to appoint him to anything.

Powell, the other Puisne, was at this time engaged in procuring the release of his son Jeremiah from a South American prison and visited Spain in the quest.

On his return to London he also desired to be appointed to the Court of Chancery.[30]

At length on August 5, 1807, at a Council held at the Queen's Palace, the Report of March 16, 1802, and the Order-in-Council founded on it were approved and the Draft Bill prepared by Allcock disapproved — his Table of Fees, however, received approval.[31]

Gore did not see fit to exercise his supposed power as Chancellor, and the project dropped not to be revived until after the War of 1812-14.

William Renwick Riddell.

Osgoode Hall,
Toronto, November 11, 1921.

[1] Blackstone's oft quoted words—Black. Comm., iii., 430. The Province existed in theory from the Imperial Order-in-Council of August 24th, 1791; but the Canada or Constitutional Act of 1791 did not become effective until December 26th, 1791, the day fixed by the Proclamation of General Alured Clarke of November 18th, 1791.

[2] (1792), 32 George III., c. 1, s. 3 (U.C.)—while the enactments of this year did not receive the Royal Assent necessary to give them validity until October 15th, 1792, they were, under the curious theory then adopted, considered to be in force from the first day of the Session, September 17th. It was not until the Act (1801), 41 George III., c. 2 (U.C.), that this theory was abolished and Statutes were made to begin only on receiving the Royal Assent. The former doctrine is one of not a few of the principles of the Common Law which seem to us absurd, but which were logical and consistent.

[3] Each of the four Districts had its own Court of Common Pleas with unlimited civil (but no criminal) jurisdiction.

[4] (1794), 31 George III., c. 2, s. 1 (U.C.): "His Majesty's Court of King's Bench, Common Bench, and in matters which regard the King's revenue by the Court of Exchequer in England;" it will be seen that the Equity jurisdiction of the Court of Exchequer is not included.

[5] See my article on "William Osgoode, First Chief Justice of Upper Canada," 41 Canadian Law Times (April, 1921), 278, at p. 281.

[6] William Dummer Powell (afterwards C. J.), was the other Puisne, having been the first Judge of the Court of King's Bench to be appointed, July, 1794.

Elmsley's recommendation of Allcock with others is in a letter from Upper Canada, October 25th, 1796, to John King, Permanent Under Secretary of State for the Home Department (1792-1806), who seems to have been the "power behind the throne" in all matters relating to such appointments—he was a close friend and constant private correspondent of Osgoode and Elmsley. From that letter—Can. Arch. Q. 283, p. 302—it appears that Simcoe had declined to make a recommendation thinking that Elmsley might wish to do so. Elmsley recommended "Henry Alcock of Lincoln's Inn, formerly a pupil, and still an intimate friend of your brother Edward; Richard Grisley of the Midland Circuit . . . Samuel Rose of Chancery Lane, editor of the late edition of Comyn's Reports, Benjamin Winthrop and John Williams, both of

Lincoln's Inn, and both well known to your brother Edward." Elmsley and some others spell the name of Allcock with one "l," but he himself invariably signed it with two in the official records of the Court and in approval of Rules of the Law Society of Upper Canada.

[7] Elmsley writing to King from York, February 1st, 1799, expressing gratitude for the appointment of his friend Allcock at his request, adds that Allcock has heard that a Court of Equity is to be established with a Master of the Rolls, and he wanted it in lieu of the Judge of the Court of King's Bench. It may show the want of knowledge at Westminster of Upper Canadian affairs that Allcock's Mandamus named him Judge of Common Pleas, the Courts of Common Pleas having been abolished nearly five years before.

[8] See letter Allcock to King, York, July 30th, 1801: Can. Arch., Q. 290, I. 85.

At the time of Allcock's appointment, it was known that Osgoode would shortly resign his Chief Justiceship in Lower Canada.

[9] Allcock's colleague, William Dummer Powell, does not hesitate to say that Allcock's influence with Hunter was due to the fact that the Judge showed the Governor legal methods whereby he might aggrandize himself at the expense of the Province. That Hunter was a grievous sinner in this regard is notorious, that his methods were not clearly illegal, however doubtful ethically, is also certain—that neither Elmsley nor Powell helped him may be accepted, and it is more than likely that Powell knew the facts and reported them accurately, if somewhat maliciously. Powell MSS in my possession.

[10] In his despatch to the Duke of Portland, Secretary of State for the Home Department, York, August 1st, 1801 (Portland had given place to Pelham two days before this date), Hunter says: "From my arrival here down to the present time, constant applications have been made to me for the establishment of a Court of Equity, and the necessity for such a Judicature is now become so urgent that it cannot longer be delayed without manifest injury to the Province." Can. Arch., Q. 290, I, 88.

[11] Can. Arch., Q. 290, I. 88. It is not hard to identify the final legal hand of Mr. Justice Allcock in this letter—the General was quite incapable of such a presentation of the alleged fact: Allcock had been educated for the Chancery Bar in England.

[12] The words of Sir John Beverley Robinson, Chief Justice of Upper Canada, in *Simpson* v. *Smith* (1846), 1 E. & A., U.C., at p. 66: he adds: "but it seems to have been generally conceded that since the Bill of Rights (1 Wm. and Mary), the Crown cannot by the exercise of its prerogative merely, erect any jurisdiction with power to judge otherwise than according to the course of the Common Law; and it has not of late years been attempted to do so"—this is the Constitutional as opposed to the High Prerogative view.

[13] See the proposed Bill *in extenso*: Can. Arch. Q. 290, I, 96A—106; and observations thereon, etc., etc., 107-112.

[14] The Royal Instructions to Hunter were practically the same as those to his predecessor Simcoe: "We do by these presents give . . . unto you . . . full power and authority . . . with the advice of the Executive Council . . . to establish . . . Courts . . . for the hearing . . . of all cases . . . according to Law and Equity." Of course, this was the Royal Prerogative expressed in a formal way: 4 Ont. Arch. Rep., (1906), p. 167.

[15] Despatch, Hunter to Portland, York, August 1st, 1801: Can. Arch., Q. 290, I, 88-92.

[16] Allcock to King, York, July 30th, 1801: Can. Arch., Q. 290, I, 85. He goes on to say that he would prefer the Chief Justiceship, but "as His Excellency is pleased to express his wishes that I should stay here, if that justice which I owe to myself and my family will admit of it, I conform;" but he required a salary equal to that of the Chief Justiceship, £1,000 sterling, from the following January.

[17] The charge of the Colonies was transferred, March 17th, 1801, to the Secretary of State for War and Colonies; and Robert, Lord Hobart, afterwards fourth Earl of Buckinghamshire, was the incumbent of that Office.

[18] Can. Arch. Q. 292, 1, 16; the O. C., do., do., do., 21.

Can. Arch. Q. 293, 155. It must be borne in mind that the Law Officers in the Province, the Attorney-General and Solicitor-General, were at that time paid by the Home Government as well as the Judges. Allcock had in the meantime written King, December 24th, 1801, reminding him of the conditions on which he had come to Canada, and added that he would accept the office of Chancellor of the proposed Court were the emoluments equal to those of the Chief Justiceship, but the latter office was infinitely preferable: Can. Arch., Q. 293, 125.

[19] Allcock's own words: Can. Arch., Q. 293, 108.

[20] Hunter's despatch to Hobart, York, November 18th, 1802: Can. Arch. Q. 293, 105: the Table of Fees is at p. 111.

[21] John, Earl and afterwards Marquis, Camden, became Secretary of State for War and Colonies, May 12th, 1804—the business of the Colonies had been transferred from the Home Office to the War Department in 1801. Camden notified Hunter, May 17th, 1804. Can. Arch., Q. 299, 123.

[22] Can. Arch. Q. 299, 140: in his despatch of November 12, 1804, with the report of the loss of "The Speedy" with Mr. Justice Cochran, Solicitor-General Gray and others, October 7th, in Lake Ontario, Hunter said that Allcock the Chief Justice would be in London when the despatch arrived—Can. Arch. Q. 300, 172.

Allcock became Chief Justice, October 7th, 1802.

[23] See despatch, Hunter to Camden, Quebec, June 25th, 1805, Can. Arch. Q. 300, 239.

Allcock's visit to England was ostensibly to settle some family property—his father being nearly 80 years of age. Can. Arch. Q. 296, 277.

[24] Sir George Shee, Bart., the first Baronet, was a useful civil servant and filled several places with ability and credit: Secretary to the Treasury (Ireland), 1799; Under Secretary, Home Office, 1800; Under Secretary War and Colonies, 1806. His son of the same name, and the second Baronet, became Under Secretary, Foreign Office, 1830; Minister to Prussia, 1834 and at Stuttgart, 1835—he died 1870.

The first Baronet was somewhat intimate with Allcock.

[25] Actions in ejectment by mortgagee against mortgagor were no doubt the chief of these.

[26] See letter from "Allcock late Chief Justice of Upper Canada" to Sir George Shee, Piccadilly, 14th March, 1806. Can. Arch. 305, 113—the whole letter is worth reading: it is reprinted in the Can. Arch. Rep. for 1892, at pp. 44, 45 of Note D.

[27] There was no Chief Justice at this time, Thomas Scott, the Attorney-General, not being sworn in until the following August (1806) —Powell and Thorpe were the puisnes.

[28] Letter Harrison to Shee from the Temple, April 1, 1806, Can. Arch. Q. 305, 119; Can. Arch. Rep. (1892), pp. 45, 46, Note D.

[29] Letter Thorpe to Cooke, March 5, 1806, Can. Arch. Q. 305, 103, Can. Arch. Rep. (1892), pp. 44 of Note D. It is true that in the same letter he urged that Lord Castlereagh (who had become Secretary for War and Colonies, July 10, 1805), should make him Chief Justice to succeed Allcock, adding: "If anything should induce him to disgrace me by sending anyone over me, I only beg you will intercede to have me removed for to remain would kill me." Thorpe wrote Cooke again from York, April 1, 1806, hoping that "you feel the necessity for a Court of Chancery," Can. Arch. Q. 305, 127; Can. Arch. Rep. (1892), p. 47 of Note D; he also wrote to his friend, Adam Gordon, from York, Upper Canada, July 14, 1806: "If there is a Court of Chancery (and the Province cannot go on much longer without it), I suppose I shall have no competitor for that, as I suppose none of these people would have the folly to propose for it;" he had not much regard for the Administrator, Alexander Grant, whom he characterizes as "an enfeebled old ignorant Methodist preacher;" he felt hurt at the contemptible creature Scott being put over his head, but the Lord Chancellor and Chief Baron of Ireland would answer for Thorpe's being qualified for the Chancery Court, Can. Arch. Q. 305, 150; Can. Arch. Rep. (1892), p. 49, Note D. He wrote Shee from Niagara, Upper Canada, October 22, 1806, after the arrival of Gore, complaining that a being had been put over his head and made Chief Justice who "has neither talent, learning, nerve nor manner." He said that "a Court of Chancery is very much wanted and was to be opened," that it was reported that Chief Justice Scott was to preside, which would convulse the Province; and he hinted at his own merits: Can. Arch. Q. 305, 175; Can. Arch. Rep. (1872), p. 50, in Note D.

Thorpe, however, left the Province for good in 1807, and need not be further mentioned here.

[30] Powell's Memorandum to William Windham, who had become Secretary for War and Colonies in succession to Castlereagh, February 14, 1806, the Memorandum dated from London, January 15, 1807, Can. Arch. Q. 310, 31.

[31] Can. Arch. Q. 310, 235, 239.

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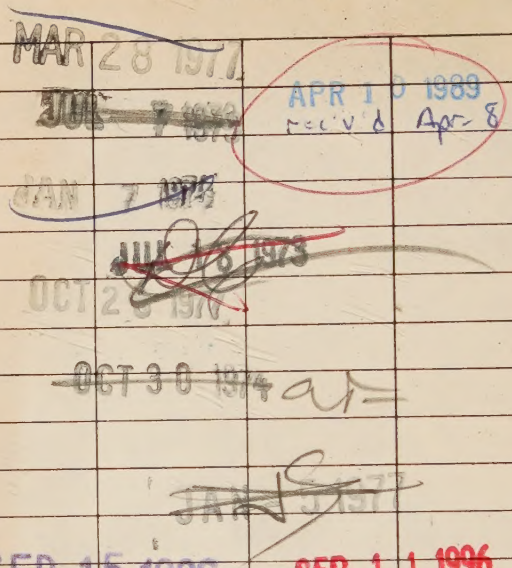

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